84-1159

Office Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

Karole K. Jensen, as
Administratrix of the
Estates of Sylvia Brown
and Michael Clark, Deceased,

Petitioner,

v.

Virgil L. Conrad, et al,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

NO.

Karole K. Jensen, as Administratrix of the Estate of Sylvia R. Brown, Deceased,

Petitioner,

vs.

Virgil L. Conrad, in his individual and official capacity as Commissioner of the Department of Social Services; Robert Kneece, Fred G. Scott, Samuel Smith, Agnes Wilson, Oscar P. Butler, Jr., John C. Williams, Jr., and Lucy C. Trower, individually and in their official capacities as members of the State Board of the Department of Social Services; Collie L. Moore, W. H. Neal, Catherine Morris, Allen Dowdy, Arlene B. Andrews, Beatrice Sumter, Robert E. Alexander, Melissa Burnette, individually and in their official capacities as members of the Richland County Board of the Department of Social Services; Mary Williams and Patricia Jones, individually and in their official capacities as Social Workers for the South Carolina Department of Social Services;

and
Barbara Locklair, individually and in her official capacity as a "Home Health Nurse" for the South Carolina Department of Social Services;

Respondent.

Karole K. Jensen, as Administratrix of the Estate of Michael Clark, Deceased,

Petitioner,

vs.

Virgil L. Conrad, in his individual and official capacity as Commissioner of the Department of Social Services; Mary D. Dusenberry, George D. Hamilton, Oscar P. Butler, Ph.D., John C. Williams, Jr., Lucy C. Thrower, Agnes Wilson, Ph.D., and W. Jerry Fedder, individually and in their official capacities as members of the State Board of the Department of Social Services; Jerry Herd, Harold E. Simpson, Ophelia S. Smith; J. Furman Gerrard, and Odell Short, individually and in their official capacities as members of the Anderson County Board of the Department of Social Services;

Respondent,

and

Kenneth Pryor, individually and in

his official capacity as Director of the Anderson County Department of Social Services;
Dawn Hawkins, individually and in her official capacity as Program Director for Human Services of the Anderson County Department of Social Services;
Susan Straup, individually and in her official capacity as Protective Services Supervices of the Anderson County Department of Social Services; and
Charie Ann Jenkins, in their official capacities as social workers with the Anderson County Department of Social Services,

Defendants.

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QUESTIONS PRESENTED

I. Whether state officials who violate specific provisions of the state statute governing their official duties enjoy good faith immunity in a civil rights action alleging that the same conduct which violated the state statute also caused a deprivation of a citizen's constitutional rights.

II. Whether the failure of state officials to perform their duties under a state child protection statute can give rise to a Section 1983 action for the unconstitutional deprivation of a child's life where the child dies as a result of the state officials' failure to perform duties mandated by the state statute.

III. Whether a state statute can create

in reported child abuse victims a right to a thorough investigation by adequately trained state officials of which the reported child abuse victim cannot be deprived without due process.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion and order of the United States District Court for the District of South Carolina, Columbia Division (Civil Action No. 82-2061-15), was entered on March 4, 1983, and is fully

printed in this petition at Appendix Page 58 . The supplemental opinion and order of the United States District Court for the District of South Carolina, Columbia Division (Civil Action Number 82-2061-15), was entered on July 18, 1983, and is fully printed at Appendix page 96.

The opinion and order of the United States District Court for the District of South Carolina, Anderson Division (Civil Action Number 82-2059-14), was entered on June 16, 1983, and is fully printed at Appendix page 150 . The opinion and order of the United States District Court for District of South Carolina, Anderson Division (Civil Action Number 82-2059-14), was entered on August 24, 1983, and is fully printed at Appendix page 204.

The order of the United States

District Court for the District of South Carolina, Anderson Division, granting Virgil Conrad's motion for summary judgment was entered on August 24, 1983, and is fully printed at Appendix page 200. The order of the U. S. District Court for the District of South Carolina, Anderson Division, directing the Clerk to enter final judgment was entered on August 24, 1983, and is fully printed at Appendix page 204.

The opinions of the United States Court of Appeals for the Fourth Circuit (Civil Action Numbers 83-1801 and 83-1936) were entered October 5, 1984, and is fully printed at Appendix page 1.

JURISDICTION

The orders of dismissal of the United States District Court for the District of South Carolina, Columbia Division, and the United States District Court for the District of South Carolina, Anderson Division, were affirmed by the United States Court of Appeals for the Fourth Circuit on October 5, 1984. This Court's jurisdiction to review the decision of the United States Court of Appeals for the Fourth Circuit is conferred by Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any Law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983:

> Section 1983. Civil Action for Deprivation of Rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

S. C. Code Ann. Sections 20-7-480 through 20-7-736 (1982 Cum. Supp.):

See Appendix, page 232.

Child Protection Act of 1977:

See Appendix, page 291.

S. C. Code Ann. Section 20-7-480 (1982 Cum. Supp.):

Section 20-7-480. Purpose.

Recognizing that abused and neglected children in South Carolina need protection, it is the purpose of this article to save them from injury and harm by establishing an effective reporting system and encouraging the reporting of children in need of protection ; by establishing an effective system of services throughout the State to safeguard the well-being and development of

endangered children and to preserve and stabilize family life, whenever appropriate; by establishing fair and equitable procedures, compatible with due process of law to intervene in family life with due regard to the safety and welfare of all family members and by establishing an effective system of protection of children from injury and harm while living in public and private residential agencies and institutions meant to serve them.

S. C. Code Ann. Section 20-7-640(B) (1982 Cum. Supp.):

Section 20-7-640. Duties of State Department of Social Services.

(B) The Department of Social Services shall have within it a separate organizational unit administered within the Department with qualified staff and resources sufficient to fulfill the purposes and functions assigned to it by this article.

S. C. Code Ann. Section 20-7-650(B) (1982 Cum. Supp.):

Section 20-7-650. Duties of

local child protective agency.

> (B) The local child protective service agencies shall be adequately staffed with persons trained in the investigation of suspected child abuse and neglect and in the provision of services to abused and neglected children and their families.

S. C. Code Ann. Section 20-7-650(C) (1982 Cum. Supp.):

Section 20-7-650.
Duties of local child protective agency.

> (C) Within twenty-four hours of the receipt of a report of suspected child abuse or neglect, the agency shall commence an appropriate and thorough investigation to determine whether a report of suspected child abuse or neglect is "indicated" or "unfounded". The finding shall be made no later than sixty days from the receipt of the report. In conducting the investigation if the facts so warrant the agency investigator may petition the Family Court of the appropriate judicial circuit for a warrant to inspect the premises and condition of the child subject of the report. The Family Court shall issue the inspection warrant upon probable cause to believe the child

is abused or neglected, as defined by this article.

S. C. Code Ann. Section 20-7-660(A) (1982 Cum. Supp.):

Section 20-7-660.
Information, training and publicity.

(A) The Department of Social Services Protective Services and the local child protective services agencies shall, on a continuing basis, inform all persons required to report under this article of the nature, problem and extent of child abuse and neglect and of their duties and responsibilities in accordance with this article. The Department of Social Services and local agencies shall also, on a continuing basis, conduct training programs for local agency staffs as well as appropriate training for persons required to report under this article.

STATEMENT OF THE CASE

Seven month old Sylvia Brown, and three year old Michael Clark, died in 1979 after suffering brutal beatings at the hands of their guardians. Their estates brought suit under 42 U.S.C. Section 1983 against the Commissioner of the South Carolina Department of Social Services (DSS), members of the State Board of DSS, members of the board of the Richland county DSS and Anderson County DSS, and various state employed caseworkers.

The Sylvia Brown Case

The estate of Sylvia Brown brought suit in the United States District Court

for the District of South Carolina at Columbia, South Carolina. The complaint alleged that Sylvia Brown was subjected to severe and brutal beatings by her parents from March 5, 1979, until her death from those beatings on May 11, 1979; that the child's peril was known to DSS caseworkers as early as March 5, 1979, but that they failed to take action because of indifference, lack of training and experience, and oversight of the measures that could have protected the child.

The complaint further alleged that Sylvia Brown's death succeeded numerous cases of injury or death to children that were known or should have been known to the state and county board members; that each of the injuries and deaths arose from the custom of both boards to assign child abuse cases to

caseworkers with inadequate training and experience; that the state board failed to take steps to adequately train its personnel; that although Sylvia Brown died directly at the hands of her parents, the defendants' failure to perform their duties as mandated by the South Carolina Child Protection Act of 1977[1] caused her to be subjected to a deprivation of her life without due process, and that her estate was entitled to relief pursuant to 42 U.S.C. Sections 1983 and 1988.

[1]The Child Protection Act of 1977, which is printed fully at Appendix page 291. was recodified in 1981 as subarticle 7 of the South Carolina Children's Code under the heading of "Intervention by Child Welfare Agencies." See S. C. Code Ann. Sections 20-7-640 to 730 (Cum. Supp. 1982), fully printed at Appendix page 263.

The Honorable Judge Clyde H. Hamilton heard oral arguments on the defendants' 12(b)(6) motions to dismiss on February 25, 1983; and on March 4, 1983, issued an order fully dismissing the complaint against the commissioner, the members of the State Board of the Department of Social Services, and defendant Locklair, and partially dismissing the complaint against the members of the Richland County board in their official capacities.

The Court ruled (1) that the commissioner, the state board members, and defendant Locklair were protected from suit in their official capacities by the eleventh amendment; (2) that county board members could not be

subject to punitive damages in their official capacities under 42 U. S. C. 1983; (3) that county board members in their official capacities are protected by sovereign immunity from wrongful death actions; (4) that state and county board members and defendant Locklair, in their individual capacities were entitled to qualified immunity because it was not "clearly established" by the "Supreme Court, the appropriate court of appeals and . . . the highest court of the state involved" that a cause of action premised on the fourteenth amendment would lie against the defendants for "failure to adequately train or supervise social workers dealing with abusive parent(s)."(See Appendix 88-89).

On March 14, 1983, the appellant filed a motion to alter or amend the judgment of March 4, 1983, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure and a motion for leave to file an amended complaint, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure. The proposed amended complaint alleged more specific facts about Sylvia Brown's death and more clearly set out the basis for the defendants' liability under Section 1983.

Judge Hamilton heard oral arguments on appellant's motions on June 28, 1983, and filed a supplemental order on July 18, 1983. He denied both the motion to alter or amend and the motion for leave

to file an amended complaint, and further dismissed the complaint as to all defendants in both their official and individual capacities. (See Appendix page 149).

Judge Hamilton denied plaintiff's motion to amend the complaint, stating the proposed amended complaint set forth more completely the facts surrounding Sylvia Brown's death, but would not alter the court's opinion with regard to the existence of "state action". (See Appendix page 146-47).

The Michael Clark Case:

In the Michael Clark case, the plaintiff's material allegations were

virtually the same as in the case of Sylvia Brown. The estate filed suit in the United States District Court for the District of South Carolina at Anderson, South Carolina. The state board members, county board members and the county director responded with motions to dismiss pursuant to Rule (12)(b)(6). The Honorable William W. Wilkins, Jr., heard oral arguments on those motions on January 24, 1983. The court reserved ruling on the motion and directed the plaintiff to submit detailed allegations as to deficiencies in training of the caseworkers, how the deficiencies were relevant to this case, why it was reasonably possible for the DSS worker

to receive the necessary training, and to allege more specifically what actual or constructive knowledge the state and county board members had. The court stayed discovery pending disposition of the motions to dismiss.

In a Memorandum of Detailed Allegations, the plaintiff outlined the derogation of duties, acts, omissions, and customs and practices fostered by the members of the state and county boards which created the situation in which Michael Clark was allowed to be abused, then killed, by his mother's live-in boyfriend. The memorandum detailed facts alleging that the Anderson County child protective service agency and the state agency had received reports from a school teacher, a neighbor, and the Alabama child protection services agency that the

children in Michael Clark's family were being abused. The memorandum recounted that Anderson County caseworkers made no investigation into the reports because Michael Clark's family could not be located and contacted within sixty (60) days of the report, even though the family continued to reside in Anderson County, and even though the family's address was kept current by the Anderson County school district and food stamp offices.

The memorandum assigned responsibility to the county board and the state board members for fostering a system of child protective services in which caseworkers, because of improper staffing, inadequate training, and excessively high caseloads, were allowed to close a file if they failed to locate the child; all of which were in

derogation of the affirmative duties owed to Michael Clark by state law. The plaintiff asserted that had the state's officers and agents performed their express duties as required by the South Carolina Children's Code, then Michael Clark would not have been killed; and that the state officers' and agents' derogation of their express duties caused a deprivation of life without due process.

During the course of considering the motions to dismiss, the defendant members of the state board submitted extensive materials relating to training received by Department of Social Service employees, and on April 4, 1983, the district court decided to view the defendants' motions to dismiss as motions for summary judgment. Plaintiff was granted leave until April 25, 1983,

to file responsive affidavits, but the stay of discovery pending disposition of the motions was not lifted.

The plaintiff submitted the affidavits of three former DSS protective service workers, and a certified copy of the South Carolina Attorney General's "Report of Investigations of Circumstances surrounding the Deaths of Certain Children in South Carolina Directly Resulting from Physical Abuse and Neglect or Abandonment". Counsel for plaintiff submitted two affidavits stating that the plaintiff would be unable by affidavits to submit evidence essential to justify opposition to dismissal unless the district court allowed depositions to be taken or discovery to be had in accordance with Rule 56 of the Federal Rules of Civil

Procedure. Among materials that the plaintiff expected to obtain through discovery was the primary investigation by the South Carolina State Law Enforcement Division into the death of Michael Clark, which included interviews with DSS caseworkers and supervisory officials. Counsel for plaintiff further stated that other admissible evidence supporting Plaintiff's allegations was exclusively within the control of the Defendants, who refused its voluntary release.

On June 16, 1983, Judge Wilkins issued an order granting summary judgment in favor of the boards of the state DSS and the Anderson County DSS. The order was based on the affidavits submitted by the parties and the objective good faith immunity rule stated by Harlow v. Fitzgerald, 457

U.S. 800 (1982). The district court further directed the plaintiff to file a more detailed complaint against the caseworkers involved in the Michael Clark investigation.

The factual findings by the district court were that Michael Clark was a three-year-old child who was killed apparently by the live-in boyfriend of Michael's mother. The Anderson County DSS became involved prior to Michael's death when it received a report on February 28, 1980 from the principal of New Prospect Elementary School concerning possible abuse of Michael's older brother. A protective service caseworker was sent to the school to investigate the matter. Based on the caseworker's interview with the child and his teacher, she apparently decided that the

family should be officially contacted. However, after repeated attempts, she failed to locate the home. Consequently, after the expiration of sixty days, the case was classified as "unfounded" and officially closed. No further action was taken by the Anderson County DSS prior to Michael's death on June 23, 1980. (See Appendix p. 152-54).

Judge Wilkins ruled that (1) the claims against the state and county board members were limited exclusively to the issue of training provided to caseworkers; (2) the affidavits submitted did not show that the state and county board members acted with deliberate indifference to the welfare of children receiving protective care; (3) the claims against the defendants in their official capacities were barred by the eleventh amendment; (4) the state

and county board members were entitled to good faith immunity because the training program they provided was not in violation of clearly established law constituting notice of possible liability. (See Appendix page 194).

On August 24, 1983, the district court denied motions by the plaintiff for leave to file an amended complaint and for amendment of the court's order granting summary judgment. Judge Wilkins, however, declined to endorse Judge Hamilton's opinion that insufficient state action was present to support liability against the defendants, and he ruled that the protective service caseworkers were not entitled to summary judgment.

The district court ruled on August 24, 1983, that the commissioner of the Department of Social Services was

entitled to summary judgment on the same basis as the state and county board members.

The Brown and Clark cases were consolidated on appeal to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit held that:

> [A]t the time of the alleged violation a constitutional right of affirmative protection was not clearly established . . . therefore, good faith immunity was available to the defendants.

See App. p. 8.

Accordingly, the Fourth Circuit affirmed both of the lower courts' rulings in the Brown and Clark cases.

While acknowledging that a right of protection may, given the proper facts, exist at present (See App. p. 43) , the Fourth Circuit found that, "[A]s of 1980, affirmative duty and constitutional rights had found a common

ground in this circuit only in the prison setting." (See App. p. 28). In support of its conclusions that the law at the time of the alleged wrongdoing was not clearly established and that the good faith immunity of Harlow was available to the defendants, the Fourth Circuit stated:

> The comparison of the post-1980 Martinez-Fox line of cases with Estelle and its pre-1980 eighth amendment progeny demonstrates just how limited the right to affirmative protection was in this circuit at the time the alleged violations occurred. Although the seeds of a fourteenth amendment-based right lay dormant in the eighth amendment cases, the defendants could not have anticipated the expansion that would later occur.

See App. p. 44.

It is from the Fourth Circuit's decision that petitioner seeks a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. The Issues Involved Are of Great Importance to the Public.

It is no secret that the physical abuse, neglect, and sexual abuse of this country's children is a growing national problem. Children, because they are totally dependent on those responsible for their care, are helpless to defend themselves. The issue of whether the government has any constitutional duties toward a child whom it knows or should know is abused is so important that it should be faced without delay.

It is estimated that there were 1.3 million reports of child abuse in the

United States in 1982.[1] State child protection agencies found an estimated forty-one per cent of those reports to be substantiated.[2] This petition raises the question of what constitutional rights abused children have. Each state in the United States has enacted a statute to protect reported child abuse victims.[3] This petition further raises the question of whether those statutes can trigger constitutional duties owed by state officials to a child once the state has been notified that the child is in danger. Because an increasingly large number of this country's children

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[1] American Humane Association, "Reported Child Maltreatment 1982," (1982).

[2] Ibid.

[3] Besharov, Criminal and Civil Liability in Child Welfare Work: The Growing Trend, p. 5 (1983).

are affected by these questions, they are of great public importance.

II. The Fourth Circuit's Misapplication of Good Faith Immunity, If Allowed to Continue, Would Stagnate the Development of Civil Rights Law.

In the lower courts, Appellant asserted that the state had an affirmative duty to protect children whom the state knew or should have known to be abused, and that the failure of state officials to perform that duty caused a child to be subjected to an unconstitutional deprivation of his life. Appellant further asserted that, at the very least, the state child protection statute created in suspected victims of child abuse a right to a thorough investigation by adequately

trained state officials[4]; and that state officials deprived Sylvia Brown and Michael Clark of that right without due process of law in violation of the fourteenth amendment.

The Fourth Circuit ruled that, while a duty of affirmative protection may now exist, such a duty was not

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[4]S. C. Code Ann. Section 20-7-650(c) mandates, among other things, that upon receipt of a report of suspected child abuse, "[T]he agency shall commence an appropriate and thorough investigation to determine whether a report... is 'indicated' or 'unfounded'." S. C. Code Section 20-7-650(b) mandates that: "The local child protective services agency shall be adequately staffed with persons trained in the investigation of suspected child abuse and neglect and in the provision of services to abused and neglected children and their families."

clearly established when Sylvia Brown and Michael Clark died in 1979. An examination of the Fourth Circuit's opinion reveals that the court arrived at this conclusion largely because of an absence of case law addressing the facts presented by the Sylvia Brown and Michael Clark cases. See Appendix, page 28. Such an approach is not mandated by Harlow, nor does it further the goal of balancing the vindication of constitutional guarantees against the interest in reducing the costs of insubstantial lawsuits. Rather, the Fourth Circuit's approach would stagnate the development of civil rights law by allowing defendants to hide behind the claim that the particular factual setting in question has never been addressed in a reported opinion. The variety of situations in which state

officials interact with citizens and the inevitable variations in human behavior would render Section 1983 meaningless if state officials are entitled to good faith immunity in every case in which there is no prior court decision directly on point. Yet the Fourth Circuit's method of applying good faith immunity would yield such a result.

The better view recognizes that officials can reasonably be expected to foresee that the general constitutional rule will be applied to specific factual settings. See e.g., King v. Higgins, 702 F.2d 18 (1st Cir. 1983). If the application of settled constitutional principles to a specific factual setting leads to a conclusion that a particular constitutional right has been violated, then liability should follow.

Judge Wilkins, in denying the

caseworkers' summary judgment motion, employed the better approach to the application of good faith immunity:

> The obligations of protective service caseworkers are specifically defined in [S. C. Code] Section 20-7-650. The requirements which must be satisfied are clearly established, thereby providing proper notice. Therefore, caseworkers who act in violation of these requirements cannot be reasonably held to have acted in "good faith." None of the purposes behind the Harlow objective good faith immunity rule would be served by such a decision. When a governmental official acts in violation of a specific statute which has a direct bearing on his official conduct and of which it is reasonable to expect him to be knowledgeable, a resulting lawsuit cannot be reasonably characterized as "insubstantial." Nor will holding that offical liable in such a case constitute unfair punishment or place undesirable restraints on his flexibility.

See App. at p. 194-95.

The Petitioner recognizes that a violation of a state statute alone does

not constitute a cause of action under Section 1983, and that in order to establish a claim under Section 1983 it is necessary to prove a violation of a federally protected right. However, where state officials violate the specific state statute governing their duties, and the same conduct which violated the statute also causes a deprivation of a constitutional right, good faith immunity should not serve as a defense to a subsequent Section 1983 claim.

While it may be argued that good faith immunity may be established even in the face of blatant violations of state law unless there is a corresponding "clearly established" federal statutory or constitutional right, the purposes behind Harlow would not be served by such an approach. Moreover, the plain wording of Harlow

does not support such an interpretation:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. (Emphasis added.)

457 U.S. at 818.

The Fourth Circiut has mistakenly focused on conduct, and not the right involved. If there was a right to life created by the constitution, which was clearly established at the time of the conduct in question, the test of Harlow has been met.

It cannot be disputed that both Michael Clark and Sylvia Brown were deprived of their lives. The question remains of whether the defendants' conduct was a proximate cause of those deprivations. The defendants would

certainly be able to argue at trial that the intervening acts of the persons who actually killed the children were a superceding cause of the childrens' deaths. This, however, is not sufficient reason to avoid the constitutional issues in this case. The plaintiff could reasonably argue at trial that an intervening cause is not a superceding cause if reasonably foreseeable by the defendant under the circumstances; and that once state officials have been put on notice that a child is being abused, further abuse and even death are reasonably foreseeable.

The Petitioner is aware that in Martinez v. California, 444 U. S. 277 (1980), this Honorable Court held that the decedent's death was too remote a consequence of the state officials' actions to hold them responsible under

Section 1983. Here, as in Martinez, the person who actually killed the decedent was not an agent of the state. However, in the Sylvia Brown and Michael Clark cases there are crucial factual distinctions from Martinez. First, the time between the defendant's conduct and the victim's death is much shorter here. Second, the defendants had been put on notice that Sylvia Brown and Michael Clark were being abused. Indeed, in the Michael Clark case the defendants had received reports from three different sources informing them of Michael Clark's plight. Thus, unlike in Martinez, the defendants here cannot claim that they were unaware that these victims, as distinguished from the public at large, faced any special danger. Moreover, the child protection act was enacted and protective service

caseworkers were hired to protect children such as Sylvia and Michael from the special danger of child abuse. The question of proximate cause in the Sylvia Brown and Michael Clark cases should be decided at trial, not by motion.

CONCLUSION

For the above-stated reasons, the Petitioner respectfully requests that

this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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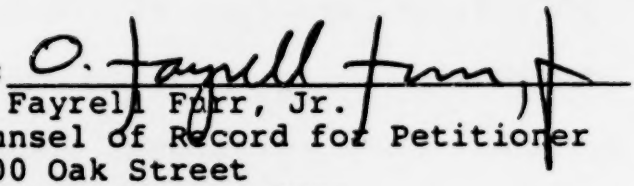
BY: 

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CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that he is an attorney at law licensed to practice in the State of South Carolina and is admitted to practice in the Supreme Court of the United States, is attorney for the Petitioner and is a person of such age and discretion to be competent to serve process.

That on January 17, 1985, he served the required copies of the attached Petition for Writ of Certiorari by placing said copies in a post paid envelope addressed to the persons hereinafter named, at the place stated below, which is the last known address, and by depositing said envelope and its contents in the United States Mail.

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84-1159

Office-Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Karole K. Jensen, as
Administratrix of the
Estates of Sylvia Brown
and Michael Clark, Deceased,

Petitioner,

v.

Virgil L. Conrad, et al,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

APPENDIX
VOLUME I

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 83-1801 (L)

Karole K. Jensen, as
Administratrix of the
Estate of Sylvia R. Brown,
Deceased,

Appellant,

vs.

Virgil L. Conrad, in his
individual and official
capacity as Commissioner
of the Department of
Social Services; Robert
Kneece, Fred G. Scott,
Samuel Smith, Agnes Wilson,
Oscar P. Butler, Jr., John C.
Williams, Jr., and Lucy C. Trower,
individually and in their official
capacities as members of the State
Board of the Department of Social
Services; Collie L. Moore, W. H.
Neal, Catherine Morris, Allen Dowdy,
Arlene B. Andrews, Beatrice Sumter,
Robert E. Alexander, Melissa
Burnette, individually and in

their official capacities as members of the Richland County Board of the Department of Social Services; Mary Williams and Patricia Jones, individually and in their official capacities as Social Workers for the South Carolina Department of Social Services;
and
Barbara Locklair, individually and in her official capacity as a "Home Health Nurse" for the South Carolina Department of Social Services;

Appellees.

No. 83-1936

Karole K. Jensen, as Administratix of the Estate of Michael Clark, Deceased,

Appellant,

vs.

Virgil L. Conrad, in his individual and official capacity as Commissioner of the Department of Social Services; Mary D. Dusenberry, George D. Hamilton, Oscar P. Butler, Ph.D., John C. Williams, Jr., Lucy C. Thrower, Agnes Wilson, Ph.D., and W. Jerry Fedder, individually and in their official capacities as members of the State Board of the Department of Social Services; Jerry

Herd, Harold E. Simpson, Ophelia S. Smith; J. Furman Gerrard, and Odell Short, individually and in their official capacities as members of the Anderson County Board of the Department of Social Services,

Appellees,

and

Kenneth Pryor, individually and in his official capacity as Director of the Anderson County Department of Social Services;
Dawn Hawkins, individually and in her official capacity as Program Director for Human Services of the Anderson County Department of Social Services;
Susan Straup, individually and in her official capacity as Protective Services Supervices of the Anderson County Department of Social Services; and
Charie Ann Jenkins, in their official capacities as social workers with the Anderson County Department of Social Services,

Defendants.

Appeal from the United States District Courts for South Carolina, at Columbia and Anderson. Clyde H. Hamilton and William W. Wilkins, Jr., District

Judges. (C/A 82-2061 & 82-205-14)

Argued: March 5, 1984

Decided: October 5, 1984

Before WIDENER, MURNAGHAN and

ERVIN, Circuit Judges.

O. Fayrell Furr, Jr. (Charles L. Henshaw, Jr. on brief) for Appellant; Joel H. Smith (William C. Hubbard, Nelson, Mullins, Grier and Scarborough on brief) and James L. Werner (Wilburn Brewer, Jr., Nexsen, Pruet, Jacobs & Pollard; George Beighley, Richardson, Plowden, Grier & Howser; Charles E. Hill, Jr., Turner, Padgett, Graham & Laney; David Robinson, II, Robinson, McFadden, Moore, Pope, Williams, Taylor & Brailsford, on brief) for Appellees.

ERVIN, Circuit Judge:

Sylvia Brown, age seven months, and Michael Clark, age three years, died in the summer of 1979 after suffering brutal beatings at the hands of their guardians. Their estates, along with the estates of four other battered children, brought suit under 42 U.S.C. Section 1983 against the Commissioner of the South Carolina Department of Social Services, members of the State Board of the Department of Social Services, members of the board of the Richland and Anderson County Departments of Social Services, and various state employed case workers. The plaintiffs alleged that the State, acting through its employees, violated the children's fourteenth amendment rights by failing

to intervene and provide protection.

The Brown and Clark cases were heard by different district courts. In the Brown case the district court dismissed the suit for failure to state a claim upon which relief could be granted. The district court in the Clark case converted the defendants' motion to dismiss to summary judgment motions and ruled for the Commissioner and the board members. The Clark court, however, refused to grant summary judgment on behalf of the case workers. Under Fed. R. Civ. P. 54(b) the Clark court entered final judgment for the Commissioner and the board members and the two cases were consolidated for

appeal.[1]

The issue now before us on appeal is whether the defendants' failure to

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[1]The Clark court's 54(b) certification did not purport to cover the caseworkers. The district court concluded that the evidence presented was insufficient to determine the caseworkers' involvement in the Clark investigation and that therefore the plaintiffs would be given additional time to continue discovery and file a more detailed complaint. Because a final judgment order had not been entered on the question of the caseworkers' liability at the time the suits were consolidated for appeal and notice of appeal was given, we believe that it would be improper to review the Clark court's denial of summary judgment to the caseworkers. The appeal by the caseworkers in Clark, therefore, is dismissed.

All of the Brown court's rulings, however, as well as the Clark court's rulings with respect to the Commissioner and the Board members, are properly before us on appeal under 28 U.S.C. Section 1291.

provide affirmative protection to the plaintiffs' decedents creates a cognizable Section 1983 claim. We conclude that at the time of the alleged violation a constitutional right of affirmative protection was not clearly established and that, therefore, good faith immunity was available to the defendants. Accordingly, we affirm the lower courts' ruling in the Brown case and affirm the grant of summary judgment in the Clark suit.

I.

A.

SYLVIA BROWN

The Plaintiff alleged that Sylvia Brown's plight first became known to Richland County social workers on

February 28, 1979, when the then four month old child was admitted to the Richland Memorial Hospital with a fractured skull. A C.A.T. scan revealed a "healing subdural hematoma." The attending physician immediately became concerned about the possibility of physical abuse by Sylvia's parents. This suspicion, the plaintiff contends, was confirmed after Mrs. Brown and her boyfriend visited Sylvia at the hospital. Hospital social workers received a report that during the visit Mrs. Brown's boyfriend held the child by the head and neck, and slapped the child in a rough manner.

The following week, a Richland Hospital social worker reported the case to the Richland County Department of Social Services and requested a child

protection investigation. After an initial review of the case, the Department of Social Services allegedly reached an agreement with Mrs. Brown requiring her to reside with Sylvia at the home of Sylvia's grandmother. Under the agreement, if Mrs. Brown returned home with her child, Sylvia would be placed in the custody of the Department of Social Services. In addition to this agreement, the Department also decided that an "intensive follow-up and in-home supervision" would be required.

According to the Plaintiff, over the course of the next two months the Department caseworkers failed to supervise adequately the family and carry out the recommendations of department officials and Sylvia's attending physician. The plaintiff

claims that Department caseworkers visited Mrs. Brown's house only twice, and on both of those occasions Sylvia was living alone with her mother. Despite the agreement, no action was taken.

On May 11, 1979, Sylvia was brought dead on arrival to the Richland Hospital. An autopsy revealed that brain hemorrhaging had occurred three times in the previous three weeks -- the last hemorrhage apparently took place only minutes before Sylvia died. After initially disclaiming responsibility,[2] Mrs. Brown pleaded guilty to involuntary manslaughter.

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[2]When Sylvia arrived at the hospital, Mrs. Brown insisted that she had fallen out of bed. In her complaint, however, the plaintiff pointed out that Sylvia's bed was only two feet off the floor.

B.

Michael Clark

On February 28, 1980, the principal of New Prospect Elementary School informed the Anderson County Department of Social Services that the older brother of Michael Clark showed signs of child abuse. A caseworker from the Department immediately met with Michael's brother. The child was bruised about the face and told the caseworker that his father had hit him on several occasions. After conferring with teachers at the school, the caseworker concluded that a meeting with Mrs. Clark was necessary. Between March 6, 1980, and April 28, 1980, the caseworker and the Department attempted

repeatedly to contact Mrs. Clark. Letters and telephone calls went unanswered, and seven visits to various addresses failed to locate the Clark family. After sixty days the Department classified the case as "unfounded" and officially closed the investigation.

On June 23, 1980, Michael Clark was beaten to death by Mrs. Clark's boyfriend, Wayne Drawdy. Drawdy was subsequently tried and convicted for the child's murder.

C.

The South Carolina Child Protection Act, S. C. Code Ann. Section 20-7-480 et seq., requires state and county board members "to [establish] an effective reporting system and . . . an effective

system of service throughout the State to safeguard the well-being and development of endangered children . . . and save them from injury and harm." S. C. Code Ann. Section 20-7-480.[3] The

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[3]S. C. Code Ann. Section 20-7-480 states in full that:

> Recognizing that abused and neglected children in South Carolina need protection, it is the purpose of this article to save them from injury and harm by establishing an effective reporting system and encouraging the reporting of children in need of protection; by establishing an effective system throughout the State to safeguard the well-being and development of endangered children and to preserve and stabilize family life, whenever appropriate; by establishing fair and equitable procedures, compatible with due process of law to intervene in family life with due regard to the safety and welfare of all family members and by establishing an effective system of protection of children from injury and harm while living in public and private residential agencies and institutions meant to serve them.

statute charges the South Carolina State Department of Social Services with responsibility for coordinating child protection services throughout the state. Specifically, the department is required to 1) monitor and evaluate the child protection services provided by the counties and localities; 2) establish a central registry for child abuse reports; 3) coordinate referrals of child abuse cases; and 4) conduct training programs for local agency staffs. S. C. Code Ann. Section 20-7-640 (C), (D); Section 20-7-660 (A).[4]

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[4]S. C. Code Ann. Section 20-7-640 (C) and (D) state in full that:

> (C) State Department of Social Services responsibilities shall include, but not be limited to: assigning and monitoring initial child protection responsibility

Under the statute the reporting system that the Department of Social Services must oversee consists of two

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Footnote continued

through periodic review of services offered throughout the State; assisting in the diagnosis of child abuse and neglect; coordinating referrals of known or suspected child abuse and neglect; measuring the effectiveness of existing child protection programs and facilitating research, planning and program development; and establishing and monitoring a statewide central registry for child abuse and neglect as hereinafter provided.

(D) The County Department of Social Services in each county is designated as the Child Protective Service Agency, whose duties are set forth in Section 20-7-650. The county in which the child resides shall be the legal place of venue; provided, that in conjunction with the powers enumerated in this section, each County Board of Social Services shall appoint an advisory board to be composed of resident professionals in the

EDITOR'S NOTE

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elements: county departments and local child protection agencies. The statute

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Footnote continued

> county in which the child resides in the fields of medicine, including nurses, education, health, social workers, members of the clergy and law enforcement officials, if available for the purpose of determining the course of protective action to be taken by the County Department of Social Services. These recommendations are to be deemed advisory only. These appointments to the advisory board shall be made in a nondiscriminatory manner.

S. C. Code Ann. Section 20-7-660 (A) states in full that:

> (A) The Department of Social Services' Protective Services and the local child protective services agencies shall, on a continuing basis, inform all persons required to report under this article of the nature, problem and extent of child abuse and neglect and of their duties and responsibilities in accordance with this article. The Department of Social Services and local agencies shall also, on a continuing basis, conduct training programs for local agency staffs as well as appropriate training for persons required to report under this article.

mandates that the latter "be adequately staffed with persons trained in the investigation of suspected child abuse and neglect and in the provision of services to abused and neglected children and their families. S. C. Code Ann. Section 20-7-650 (B). The statute empowers the local agency to "petition the Family Court . . . to intervene" on behalf of the child should the agency deem it necessary, but the statute does not expressly require the agency to intervene. S. C. Code Ann. Section 20-7-650 (J)[5]

In both the Clark and Brown cases,

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[5]S. C. Code Ann. Section 20-7-650 (J) states in full that:

> (J) If at any time after the initiation of protective services by the agency those receiving

the plaintiffs argued before the lower court that the statute created a "special relationship" between the state and victims of suspected child abuse by imposing an affirmative duty on the state government "to save [suspected victims] from harm." Relying primarily on our decision in Fox v. Custis, 712 F.2d 84 (4th Cir. 1983), the Clark and

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Footnote continued

services indicate a refusal to cooperate, the agency shall withdraw. If the facts so warrant, the agency may petition the Family Court to invoke the jurisdiction of the court under the Family Court Act to intervene, but in no case shall the agency threaten such action to coerce participation.

Brown estates contended that this "special relationship" gave rise to a right under the fourteenth amendment to affirmative protection by the State.

In the Clark case, the district court agreed with the plaintiff that where "an individual [has been] legally entrusted to the care or protection of governmental officials," a failure to protect could constitute a deprivation of life without due process and thereby violate the fourteenth amendment. J. A. at 330-33. But the court concluded that because there was no "clearly established case law" defining the "general due process" requirements of the Child Protection Act and providing "reasonable notice of possible liability," the commissioners and the board members were entitled to good faith immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Accordingly, the court granted the Commissioners' and board members' motions for summary judgment.

In the Brown case, the district court concluded that the plaintiff had failed to allege a federal or constitutional claim upon which relief could be granted under 42 U.S.C. Section 1983. The fourteenth amendment, the court held, only created a right to affirmative protection by the state in those instances where legal custody or direct supervisory control of the victim lay in the hands of the state. Because the appellant's complaint never alleged that the state had assumed custody or direct supervisory control of Sylvia Brown under the Act, the court dismissed the suit as to all defendants.

On appeal, the appellants argue that the courts below erred in both

granting summary judgment for the Commissioner and the county and board members in Brown and in dismissing the suit in Clark. The appellants' contentions, we believe, hinge on two "threshold" issues: whether the fourteenth amendment affords the appellants a right to afirmative protection by the state, and if such a right presently exists, whether it was established clearly enough at the time the alleged deprivation occurred to avert the application of good faith immunity under Harlow.

II.

A.

Section 1983 of the Civil Rights Act only protects against action under color of state law that "subjects . . .

any citizen . . . or other person . . . to the deprivation of any rights . . . secured by the Constitution and laws" of the United States. Baker v. McCollan, 443 U.S. 137, 146-47 (1979); Paul v. Davis, 424 U.S. 693 (1976); Fox v. Custis, 712 F.2d 84, 87, (4th Cir. 1983). Thus, "the first inquiry in any Section 1983 suit . . . is whether the plaintiff has been deprived of [such] a right." Baker, 443 U.S. at 140. This inquiry, in turn, "involves 'isolating the particular constitutional infringement complained of'." Fox, 712 F.2d at 87, quoting Martinez v. California, 444 U.S. 277, 284 n.9 (1980).[6]

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[6]Federal jurisdiction in this case arises under 42 U.S.C. Section 1983. Our inquiry, therefore, is limited solely to

In this case the appellants argue that the decedents possessed a constitutional right to protection by the government from harm inflicted by their parents or those acting as their parents. Specifically, the appellants assert that the State's failure to intervene effectively deprived Michael Clark and Sylvia Brown of liberty rights secured by the fourteenth amendment. As an initial matter, therefore, our inquiry must focus on the extent to which we can now assert that a right of affirmative protection exists. But our analysis must not stop there; we must

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Footnote continued

determining whether the plaintiffs have alleged a vindicable federal or constitutional right. A state cause of action, based either on statute or on common law, may be available to the plaintiffs, see part III infra, but that is not the issue before us.

also determine the precise time at which such a right -- if it presently exists -- can be said to have emerged. See Harlow v. Fitzgerald, 457 U.S. 800 (1982). For this a careful review of recent case law is required.

The most relevant line of cases dates from 1976. The alleged violations occurred in 1979. Thus our examination of the case law must be aimed at determining the extent to which a clearly defined right had emerged from this shifting line of cases as of 1979.

i

The current debate over affirmative duty and constitutional tort stems in large part from a prisoner petition case decided by the Supreme Court in 1976. In Estelle v. Gamble, 429 U.S. 97 (1976), an inmate of the Texas Department of

Corrections sued prison officials for failing to provide adequate medical treatment for a back injury suffered while performing a prison work assignment. The prisoner's claim was brought under Section 1983, and alleged that prison officials had subjected him to cruel and unusual punishment in violation of the eighth amendment. The Court held that although the record failed to support the prisoner's claims, prison officials could not act with "deliberate indifference" to the medical needs of prisoners without violating the eighth amendment:

> We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," Gregg v. Georgia, supra, at 182-183, 49 L Ed 2d 859, 96 S Ct 2909 (joint opinion), proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to

> the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under Section 1983.

429 U. S. at 104-05. The Court reasoned that because the prisoner was unable "'by reason of the deprivation of his liberty, to care for himself'", it was only "just" that "'the public'" be required to care for him. Id. at 103-04, quoting Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926). In the Court's view, therefore, the government had an "obligation to provide medical care for those whom it is punishing by incarceration." Estelle, 429 U.S. at 103.

We followed Estelle in several similar eighth amendment Section 1983

prisoner cases. See Orpiano v. Johnson, 632 F.2d 1096 (4th Cir. 1980); Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979); Withers v. Levine, 615 F.2d 158 (4th Cir.), cert. denied, 449 U.S. 849 (1980). In all of these cases, we limited the imposition of an affirmative duty of care on the government to prison settings where eighth amendment concerns were involved and state employees had acted with "deliberate indifference."

Thus, as of 1980, affirmative duty and constitutional rights had found a common ground in this circuit only in the prison setting. The government's duty to protect applied only to those incarcerated by the state, for only those individuals could be subjected to an eighth amendment violation. A look at the cases that quickly followed Estelle -- cases which expanded the

right to affirmative protection -- underscores by comparison just how narrow the right was in 1980. It is to those cases that we now turn.

ii

The first major post-Estelle decision was decided by the Supreme Court in 1980. In Martinez v. California, 444 U.S. 277 (1980), the Court was asked to address the question of whether the government had an affirmative duty under the fourteenth amendment to protect a private citizen from the actions of a parolee. Martinez, a fifteen year old girl, had been murdered by a "mentally disturbed sex offender" who had been sentenced to one to twenty years, but paroled after five. The State of California conceded

that the parolee was a known risk when he was let out. Legally, the attacker was still in the custody of the state when he killed Martinez.

The Court ruled that Martinez had failed to allege a cognizable claim under Section 1983. Yet rather than addressing directly the issue of whether Martinez had a constitutional right to protection under the fourteenth amendment, the Court chose to decide the case on the narrow grounds that Martinez had failed to establish proximate cause. The parolee, the Court pointed out, was not "an agent of the parole board," id. at 285, and the murder had occurred five months after the parolee's release. Id. Under these circumstances, the Court concluded, the causal connection between the action of the

parolee and that of the State was too attenuated to hold the government liable.[7]

But in the final paragraph, the Court clearly left open the possibility that in another setting the fourteenth amendment right asserted by Martinez might be upheld in a Section 1983 suit:

> We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole. But we hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law.

Id. at 285.

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[7] Cf. Rizzo v. Goode, 423 U.S. 362 (1976) (police department's failure to act in face of statistical pattern of police abuse does not give rise to fourteenth amendment violation because no showing of "direct responsibility" by the department for the incidents).

In 1981 the Second Circuit attempted to resolve the question left open by Martinez. In Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981) two young girls filed suit against the State of New York after they were beaten and sexually abused by their foster father. The girls, who were technically in the custody of the New York City Commissioner of Welfare, alleged that the State had violated an affirmative duty of protection -- guaranteed under the fourteenth amendment -- when it failed to inspect and recertify the foster home to which the claimants had been assigned.

Without expressly mentioning the fourteenth amendment, the court held that the State could violate a "constitutionally protected liberty or

property interest" by failing to protect an individual who had been placed in the government's "custody or care." Id. at 141.[8] In its discussion the court cited Estelle v. Gamble and other eighth amendment prisoner cases. Id. This citation was significant, for it marked the first time that the eighth amendment analysis had been applied to a traditional fourteenth amendment claim involving liberty and property interests.

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[8]Although the court concluded that a right existed, it ultimately ruled for the defendants because the plaintiffs had failed to establish that the state had acted with "deliberate indifference." Doe, 649 F.2d at 141. The Doe court's discussion of deliberate indifference need not concern us here, for that issue only becomes relevant if there has been a determination that a right exists in the first instance.

One year later, in 1982, the Seventh circuit also addressed the issue left open in Martinez. Although the court ultimately ruled against the Plaintiff, [9] it significantly expanded the reasoning in Doe. In Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982), a schizophrenic, with a history of criminal violence murdered Marguerite Bowers one year after being released from an Indiana State Mental Hospital. Bowers' estate filed a Section 1983 suit against the hospital, claiming that the State had reason to know that the former patient was dangerous and thus had acted recklessly in permitting his discharge.

The court disagreed. Expressly refusing to distinguish the case from

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[9] See infra note 10.

Martinez, the Court ruled that "there is no constitutional right to be protected by the State against being murdered by criminals or madmen." In the Seventh Circuit's view, the Constitution was designed as "a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." Id. at 618.

The court, however, was careful to limit its holding to situations where the state had not taken an active role in placing an individual in a position of danger:

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state

> puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Id. It was here, the court reasoned, that a fourteenth amendment claim based on an affirmative duty overlapped with the affirmative duty recognized by the Supreme Court in eighth amendment prisoner cases:

> It is on this theory that state prison personnel are sometimes held liable under Section 1983 for the violence of one prison inmate against another.

Id. Significantly, the court did not draw a distinction between "custodial" and "other" relationships. In this sense, Bowers moved one step beyond Doe. Rather than implicitly limiting governmental liberty to custodial

relationships the Bowers court chose to speak in broader terms; in the court's view, it was not the precise type of relationship that mattered, but whether the government had placed an individual in danger.[10]

The analytical approach of Bowers was closely followed by this court one year later in Fox v. Custis, 712 F.2d 86 (4th Cir. 1983). The facts of Fox were similar to Martinez. Fox, a young woman, suffered injuries when a Virginia parolee set fire to her house. The parolee had been convicted previously of arson and grand larceny and sentenced to

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[10]Ultimately the court ruled against Bowers because she had failed to show that the state had placed her in a position of danger. 686 F.2d at 618-19.

twenty years. After two years, he was paroled. Despite several violations, the parolee was permitted to remain on parole. It was at this point that the Fox arson occurred.

We approached the question of affirmative duty in two ways. First, as in Martinez, we concluded that the injuries were "'too remote' from the challenged conduct of the State to constitute a 'deprivation' of constitutional rights under Section 1983." Id. at 887. But convinced that the "mix of factors" made this a less persuasive case than Martinez to decide on proximate cause grounds, we concluded that it was also necessary to examine whether the appellant had asserted a cognizable constitutional claim under the fourteenth amendment. Citing Bowers, we held that a duty could arise

out of a special "custodial or other relationships":

> With one qualification, we agree with the Seventh Circuit's recent holding that, in general, there simply is "no constitutional right to be protected by the state against . . . criminals or madmen," and that because in corollary, there is no "constitutional duty [on the state] to provide such protection, its failure to do so is not actionable under section 1983." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). The qualification -- an important one actually acknowledged by the Bowers court, id. -- is that such a right and corollary duty may arise out of special custodial or other relationships created or assumed by the state in respect of particular persons. For example -- as we have held in this circuit -- such a right/duty relationship may arise under Section 1983 with respect to inmates in the state's prisons or patients in its mental institutions whom the state knows to be under specific risk of harm from themselves or others in the state's custody or subject to its effective control. Withers v. Levine, 615 F.2d 158 (4th Cir.), cert. denied, 449 U.S. 849, 101 S.Ct. 136, 66 L.Ed.2d 59 (1980) (prison inmates under known risk of harm from homosexual assaults by other inmates); Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979) (inmate under observed attack by another inmate); Woodhous v. Virginia, 487

F.2d 889 (4th Cir. 1973) (same as Withers); cf. Orpiano v. Johnson, 632 F.2d 1096, 1101-03 (4th Cir. 1980), cert. denied, 450 U.S. 929, 101 S.Ct. 1387, 67 L.Ed.2d 361 (1981) (no right where no pervasive risk of harm and specific risk unknown); see also Spence v. Staras, 507 F.2d 554 (7th Cir. 1974); Gann v. Delaware State Hospital, 543 F. Supp. 268, 272 (D.Del. 1982); Walker v. Rowe, 535 F. Supp. 55 (N.D. Ill. 1982) (duty of state to protect guards).

Id. at 88.

Our ruling, however, did not simply rehash Bowers. In two important respects Fox expanded on precedent. First, Fox completed the convergence of eighth and fourteenth amendment analysis that had begun in Doe and took shape in Bowers. The constitutional right that we asserted could arise was clearly based on the fourteenth amendment, but the shape and definition that we gave to that right by using the term "custodial or other relationship" was influenced in large part by the considerations that

lay behind the eighth amendment cases. Recognizing that the fourteenth amendment could not be read to establish a general affirmative duty to the public at large, we chose to limit that duty by applying a rationale similar to that used in Estelle: namely, that where the state had selected an individual from the public at large and placed him in a position of danger, the state was enough of an "active tortfeasor" to make it only "just" that the state be charged with an affirmative duty of protection. Bowers and Doe also made use of the eighth amendment analysis to address the fourteenth amendment issue, but Fox acknowledged more candidly and expressly than either Doe or Bowers the concerns that had helped to shape the contours of the duty imposed on the government.

Second, the Fox ruling was important because it stated in terms more explicit than Bowers that a right to affirmative protection need not be limited by a determination that there was a "custodial relationship." The Fox court ruled that a right to protection could arise from a custodial or other relationship.

Fox's estate, however, failed to claim that a special relationship existed between her and the State. For this reason we found it unnecessary to define the type of "special relationship required to give rise to a right . . . to affirmative protection. . . ." 712 F.2d at 88. In one sense, then, Fox represented the culmination of a line of analysis that had begun in Martinez, for it firmly established that a right of

affirmative protection could arise under the fourteenth amendment. But at the same time Fox left the inquiry nearly as open-ended as Martinez, for it did not purport to delimit the scope of the right.

Having established that a right of protection may, given the proper facts, exist at present, the question now becomes whether that right was properly invoked by the plaintiffs in the cases at hand.

B.

Under Harlow v. Fitzgerald, 457 U.S. 800 (1982), governmental officials will not be held liable if the law at the time of the alleged wrongdoing was not "clearly established." Id. at 818.

Sylvia Brown and Michael Clark died in the spring of 1979. As our discussic in Part II A above makes clear, an affirmative duty of protection under the fourteenth amendent did not emerge until after 1980. Indeed, the comparison of the post-1980 Martinez-Fox line of cases with Estelle and its pre-1980 eighth amendment progeny demonstrates just how limited the right to affirmative protection was in this circuit at the time the alleged violations occurred. Although the seeds of a fourteenth amendment-based right lay dormant in the eighth amendment cases, the defendants could not have anticipated the expansion that would later occur.

Moreover, even were we to rule that the defendants could have foreseen the Fox holding, it is not clear that under

the facts of this case the defendants could, or should, have foreseen that a "special relationship" existed. Given the absence of specific guidelines to determine precisely what constitutes a "special relationship" and the particularly "close" nature of the factual cases before us, we would be hardpressed to conclude that the law as it affected the defendants was "clearly established."[11] We conclude, therefore,

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[11] Although we find no need to provide a comprehensive definition of "special relationship" given the facts of these cases, we note that these cases underscore some of the factors that should be included in a "special relationship" analysis. These factors -- which would make these cases particularly close ones were we to decide them -- include:

1. Whether the victim or the perpetrator was in legal custody at the time of the incident, or had been in legal custody prior to the incident.

that we need not decide whether, under the circumstances of this case, the State had created or assumed a "special

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Footnote continued

Here, for example, as in Fox and Martinez and unlike the situations in Withers and Woodhous, the claimants were members of the general public and not in custody. The state defendants were unaware that they, as opposed to anyone else in the public at large, faced a special danger. This fact, combined with the lack of a past or present custodial relationship between the state and the perpetrators, would argue against finding that a special relationship existed.

2. Whether the state has expressly stated its desire to provide affirmative protection to a particular class or specific individuals.

   This factor does not really argue convincingly one way or the other in our cases. It is difficult to conclude that the State intended to "single out" the decedents and

relationship" with the Clark and Brown families. All of the defendants were entitled to a good faith immunity

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Footnote continued

place them in its own care as in the eighth amendment cases that Fox relies on so heavily. On the other hand, the preamble of the Child Proteciton Act does clearly express a desire to take affirmative steps to locate and protect potentially abused children.

3. Whether the State knew of the claimants' plight.

This factor goes more to the breach of the "special relationship" than a definition of the relationship. Yet it may prove probative of the extent to which the State intended to protect or watch over the particular claimant involved. In this case there is some indication that the State knew the children were being beaten. This strengthens the argument that some sort of special relationship had been established.

defense against liability under Section 1983.[12] The district court should have

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[12]The appellants argue that good faith immunity is not applicable because the affirmative duty owed by the State was "clearly established" in the Child Protection Act at the time the alleged wrongdoing occurred. This argument simply misses the mark. The law in this instance that must be "clearly established" to avert the application of Harlow is a constitutional right to protection by the State. A state statute, by itself, cannot create a substantive constitutional right. Maine v. Thiboutot, 448 U.S. 1 (1980). Once an affirmative duty has been found to exist under the fourteenth amendment, it may then be possible for a State statute to trigger the application of that right. But if the underlying substantive right has not yet been clearly established, good faith immunity may be invoked regardless of the language of the statute.

Moreover, it is not even clear that the Child Protection Act requires the type of affirmative protection that the claimants argue that it does. The Act does not create an expess duty of intervention but rather provides only that the State "may" intervene. See discussion supra at 10.

dismissed both complaints along with the pendent claims at the summary judgment stage.[13]

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[13]Judge Wilkins did not act improperly in dismissing the case at the summary judgment stage with respect to those defendants for whom he found qualified immunity was applicable. In Harlow the Supreme Court eliminated the subjective good faith standard that had been used to determine if qualified immunity should be applied to executive officials and substituted an "objective reasonableness" test. The court reasoned that if the law was not clearly established, immunity should be applied at the pretrial stage so as to minimize disruption of government activities. The court stated that:

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge may determine, not only the currently applicable law, but whether that law was clearly established at the

We emphasize, however, that our decision today does not mean that a good faith immunity defense will always be available for defendants sued for failing to provide affirmative protection based on a Fox analysis. We hold only that under the facts of this case neither the state and county board members nor the caseworkers could reasonably have been expected to know

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Footnote continued

> time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed.

457 U.S. at 818.)

that a failure to protect Sylvia Brown and Michael Clark potentially constituted a violation of their fourteenth amendment rights. Because our decision is based upon our belief that the Fox decision could not have been anticipated by the defendants, we need not attempt a definition of the type of relationship required to give rise to a right of protection under Fox. Were the issue properly before this court on different facts, there would be nothing to preclude further definition of the meaning of that term followed by a ruling that the facts of that case fell within the meaning of "special relationship".

III.

Although our decision today leaves

the appellants without a remedy in federal court, the victims's estates still have several causes of action available to them in state court. We express no view on the appellants' rights under the tort law of South Carolina, but as the Seventh Circuit pointed out in Bowers, "[t]he tendency in the common law has been to impose ever greater liability on officials who negligently fail to protect the public from dangerous criminals and lunatics." Bowers, 666 F.2d at 618.[14]

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[14] See, e.g., Homere v. State, 48 App. Div.2d 422, 370 N.Y.S.2d 246 (1975); Leverett v. State, 61 Ohio App. 2d 35, 40-41, 399 N.E.2d 106, 109-10 (1978); Williams v. United States, 450 F. Supp. 1040, 1044-45 (D.S.D. 1978).

IV.

For the foregoing reasons, the judgment of the District Court for the District of South Carolina at Columbia is affirmed, and the judgment of the District Court for the District of South Carolina at Greenville is affirmed in part and dismissed in part.

AFFIRMED IN PART; DISMISSED IN PART.

MURNAGHAN, Circuit Judge, concurring:

Sometimes I yield to an impulse to embellish an opinion in a way not strictly necessary. The notion may exist that I can clarify or improve the law, even though the issue I endeavor to address is not truly presented by the case. As time goes by, however, I am coming more and more to an appreciation that, however silver the speech, silence is usually constructed from 24 karat gold.

So, with deference, and despite the freshly minted pure silver from which the majority opinion has been cast, I disassociate myself from everything appearing in the opinion endeavoring to establish the existence of a special relationship between the brutalized

children on the one hand and the South Carolina Department of Social Services and its case workers on the other. Were the question before us, we should have to investigate whether the "special relationship" due process contention could hold water in the absence of the South Carolina legislation. Parental control of the destiny of a child may, in general, constitute so important a right that the Supreme Court might determine that a constitutional duty simply is not imposed on any state or local government employee who learns of suspected abuse to take steps to insure that a child apparently brutalized is removed from parental custody or otherwise guarded against violence from the parents.

Second, assuming that, absent

statute, no right exists under the Fourteenth Amendment, we should, nevertheless, have further to decide whether the South Carolina statute brings about a constitutional right of affirmative protection. Neither of those two questions is easy of resolution. The cases supporting the majority's conclusion that there is a right (though admittedly rendered inapplicable here because of the existence of a good faith immunity defense) generally partake of the characteristic called "dicta". They are ones which asume there is a right, but find it not applicable or not violated on the facts of the cases themselves.

Accordingly, prudence dictates to me that I limit my participation in the majority opinion to concurrence in the

proposition which all panel members accept: namely, that, whether or not a constitutional right to affirmative protection exists, it manifestly was not established clearly enough to permit recovery at the time that the alleged deprivations occurred. My concurrence consequently rests solely on the uncontrovertible existence in each of the cases of good faith immunity as a defense against liability under 42 U.S.C. Section 1983.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Karole K. Jensen, as Administratrix of the Estate of Sylvia R. Brown, Deceased, Plaintiff, vs. Virgil L. Conrad, in his individual and official capacity as Commissioner of the Department of Social Services; Robert Kneece, Fred G. Scott, Samuel Smith, Agnes Wilson, Oscar P. Butler, Jr., John C. Williams, Jr., and Lucy C. Trower, individually and in their official capacities as members of the State Board of the Department of Social Services; Collie L. Moore, W. H. Neal, Catherine Morris, Allen Dowdy, Arlene	CIVIL ACTION NO. 82-2061-15 ORDER

B. Andrews, Beatrice)
Sumter, Robert E.)
Alexander, Melissa)
Burnette, individ-)
ually and in their)
official capacities)
as members of the)
Richland County)
Board of the Depart-)
ment of Social)
Services; Mary)
Williams and)
Patricia Jones,)
individually and in)
their official capa-)
cities as Social)
Workers for the)
South Carolina)
Department of Social)
Services; and)
Barbara Locklair,)
individually and in)
her official)
capacity as a "Home)
Health Nurse"for the)
South Carolina)
Department of)
Social Services,)
Defendants.)
_____)

This matter comes before the court upon three motions to dismiss for failure to state a claim upon which relief may be granted, filed by the defendants pursuant to Rule 12(b)(6) of

the Federal Rules of Civil Procedure. The first motion was filed on November 15, 1982, by defendants Conrad, Kneece, Wilson, Butler and Williams, the Commissioner of the South Carolina Department of Social Services (hereinafter "Commissioner") and the members of the State Board of the Department of Social Services (hereinafter "State Board"), respectively. All defendants were sued both in their individual and official capacities. This motion was later joined by three other members of the State Board, Ms. Lucy C. Trower (January 11, 1983), Mr. Samuel Smith (February 23, 1983) and Mr. Fred G. Scott (March 2, 1983). The cause behind their delay in joining the motion to dismiss was attributed to delay in service of process.

The second motion to dismiss was filed on November 16, 1982, by the defendants, Moore, Neal, Morris, Andrews, Sumter, Alexander and Burnette, members of the Richland County Board of the Department of Social Services (hereinafter "County Board") who were also sued by the plaintiff in their individual and official capacities. This motion was later joined by defendant board member Allen Dowdy on January 10, 1983.

The third motion to dismiss was filed by the defendant Barbara Locklair in her individual and official capacity, on January 13, 1983. At oral argument on the motions to dismiss, held February 25, 1983, the court was advised that Ms. Locklair is employed by the South Carolina Department of Health and Environmental Control as a home health

nurse.

In analyzing the motions to dismiss, the court will first assess the viability of the plaintiff's complaint as asserted against the Commissioner and Barbara Locklair in their official capacities and against the State Board members in their official capacities. Next the court will address the motion to dismiss filed by the members of Richland County Board in their official capacities. Finally, the court will turn to an analysis of all three motions to dismiss asserted by defendants in their individual capacities.

COMMISSIONER, STATE BOARD AND BARBARA LOCKLAIR OFFICIAL CAPACITIES

Karole K. Jensen, as Administratrix of the Estate of Sylvia R. Brown, a

deceased minor, brings this action against (1) the Commissioner of the South Carolina Department of Social Services (2) members of the State Board of the South Carolina Department of Social Services (3) members of the Richland County Board of the Department of Social Services (4) two social workers employed by the South Carolina Department of Social Services and (5) Mrs. Barbara Locklair, a home health nurse employed by the South Carolina Department of Health and Environmental Control. Ms. Jensen brings this action pursuant to 42 U.S.C. Sections 1983 and 1988. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the U. S. or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

> by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper porceeding for redress.

In this action, Ms. Jensen alleges that these defendants deprived her decedent, Sylvia Brown, of her Fourteenth Amendment right to life by their failure to protect her from the physical abuse inflicted upon her by her parent(s), such abuse being the ultimate cause of her death on May 11, 1979. The complaint also asserts a pendent state claim brought pursuant to the South Carolina Wrongful Death Act, Sections 15-51-10, 15-51-20 and 15-51-40 of the Code of Laws of South Carolina 1976, as amended, for the benefit of the statutory beneficiaries of the deceased. Plaintiff seeks actual and punitive damages, an award of reasonable attorneys fees and costs, and such other

relief as this court would deem just and proper.

At the motions hearing held on February 25, 1983, the court raised, sua sponte, and does now address, the question of the applicability of the Eleventh Amendment of the United States Constitution to the suit against the Commissioner, the State Board and Barbara Locklair in their official capacities. The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Although, by its terms, the Amendment does not preclude suits against a state by its own citizens, the Supreme Court has held that a state is

immune from suits brought in federal courts by its own citizens as well as by citizens of another state or citizens or subjects of any foreign state. Edelman v Jordan, 415 U.S. 651, 662-63, 94 S. Ct. 1347, 39 L.Ed2d 662 (1974), citing Hans v. Louisiana, 134 U.S. 1 (1890); Duhne v. New Jersey, 251 U.S. 311 (1920); Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944); Parden v. Terminal R. Co., 377 U. S. 184 (1964); and Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973). Moreover, it is well settled that the Eleventh Amendment bars a suit against a state agency, entity or institution, such as the Department of Social Services and its governing body, the State Board, which functions as an arm or alter ego of the state. Alabama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057,

57 L.Ed.2d 1114 (1978). That this suit is brought against the Commissioner, Barbara Locklair, and the members of the State Board "individually and in their official capacity" does not alter the fact that it is brought against the Department of Social Services and the Department of Health and Environmental Control, with respect to Ms. Locklair. As set forth by the Third Circuit in Laskaris v. Thornburgh, 661 F.2d 23 (1981):

> [A]n action in federal court for damages or back pay against a state official acting in his official capacity is barred [by the Eleventh Amendment] because such retrospective relief necessarily depletes the state treasury. Id. at 26.

Also, as set forth by the Fourth Circuit in the 1982 case of Hughes v. Blankenship, 672 F.2d 403 (4th Cir. 1982):

> Official capacity suits represent but another way of pleading an action against the entity of which the officer is an agent, Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978), and damages may be awarded against a defendant in his official capacity only if they would be recoverable against the governmental entity itself. Monell, supra; Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980).

Similarly, the supreme Court in Edelman v. Jordan, supra, stated, "It is also well established that even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment." Edelman at 94 S. Ct. 1355.

Therefore, the rule has evolved that a suit seeking to impose a liability which must be paid from public (state) funds is barred by the Eleventh Amendment. Edelman at 94 S. Ct. 1356. In the instant suit, any recovery by the

plaintiff against the Commissioner, Barbara Locklair and the State Board members in their official capacities would require payment from public funds which is impermissible under the Eleventh Amendment. Belcher v. South Carolina Board of Corrections, 460 F. Supp. 805 (1978). Therefore, the court is of the opinion, based on Laskaris, supra, Edelman, supra, and Hughes, supra, that a suit against members of the State Board of the Department of Social Services in their official capacities and against Barbara Locklair and the Commissioner in their official capacities which seeks damages is a suit aginst the state of South Carolina for purposes of Eleventh Amendment analysis.

The immunity afforded the states by the Eleventh Amendment can be overcome

if the state waives its constitutional immunity and consents to suit or, with respect to the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution if Congress abrogates the state's immunity pursuant to its authority to enforce the substantive provisions of those amendments "by appropriate legislation." Amendment XIII, Section 2; Amendment XIV, Section 5; Amendment XV, Section 2. The doctrine of sovereign immunity prevails in South Carolina. Belue v. City of Spartanburg, 276 S. C. 381, 280 S.E.2d 49 (1981). Clearly, the state has not waived its immunity regarding claims such as those asserted by the plaintiffs herein. Additionally, Congress did not exercise its power to abrogate the state's Eleventh Amendment immunity in enacting 42 U.S.C. Section

1983. Quern v. Jordan, 440 U.S. 332, 99 S. Ct. 1139, 59 L.Ed 2d 358 (1979); Sessions v. Rusk State Hospital, 648 F.2d 1066 (5th Cir. 1981) and Gourdine v. Ellis, 435 F. Supp. 882 (D.S.C. 1977). In summary, absent consent to suit or federal legislation abrogating its Constitutional immunity, neither the state nor its alter egos, the State Board, the Commissioner and Barbara Locklair, sued in their official capacities, are subject to suit under 42 U.S.C. Section 1983. (emphasis added).

COUNTY BOARD MEMBERS
OFFICIAL CAPACITIES

As stated previously, a suit against a public official in his official capacity is treated as a suit against the entity, therefore this suit against the Richland County Board of the

Department of Social Services is for all purposes a suit against Richland County.[1] Huges v. Blankenship, supra;

[1]During oral argument the question arose as to whether the Richland County Board of the Department of Social Services was but the alter ego of the South Carolina Department of Social Services and thereby entitled to immunity from suit in this court under the Eleventh Amendment principles discussed earlier. There is no information in the record as to the relationship between this board and the state agency for purposes of Eleventh Amendment analysis. As set forth by the Supreme Court in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 280, 97 S. Ct. 568, 572, 50 L.Ed.2d 471 (1977), the relevant isssue is whether the County Board is "to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or . . . as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." See also, Holley v. Lavine, 605 F.2d 638 (1979). In view of the inadequacy of the record at this time, the court reserves for later decision the question of the applicability of Eleventh Amendment immunity to the County Board.

Laskaris v. Thornburgh, supra and Universal Amusement Co. v. Hofheinz, 646 F.2d 996 (5th Cir. 1981). In Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L.Ed. 2d 611 (1978), the Supreme Court held that a local government may be liable under Section 1983 for an injury caused by a "policy or custom . . . made by its lawmakers or . . . those whose edicts or acts may fairly be said to represent official policy . . . ." These constitutional deprivations may be "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." 436 U.S. at 691, 98 S. Ct.

at 2036. Additionally, the Fourth Circuit has held in the 1981 case of Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981) that official policy may be established by the omissions of supervisory officials as well as from their affirmative acts. In Avery, the plaintiff alleged that the county, its board of health and its board of social services, and several individuals wrongfully caused her sterilization after informing her that she had sickle cell trait. The Fourth Circuit, in reversing the district court's grant of summary judgment in favor of the county and its boards asserted:

> [T]he conduct of the boards may be actionable if their failure to promulgate policies and regulations rose to the level of deliberate indifference to Avery's right of procreation or constituted tacit authorization of her sterilzation. (emphasis added) [cites omitted] Id. at 114.

In view of the Fourth Circuit's pronouncement in Avery and the Second Circuit's decision of Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981), discussed infra, the court is of the opinion that the plaintiff's complaint should not be dismissed under Rule 12(b)(6) for failure to state a claim as against the County Board members sued in their official capacities. Under the test applicable to a motion to dismiss as set forth by the Supreme Court in Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957), this court cannot now hold that, "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief."

Therefore, plaintiff's cause of

action pursuant to 42 U.S.C. Section 1983 and 1988 asserted against the County Board members in their official capacities stands. However, the court does hold, in accordance with the Supreme Court's ruling in City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S. Ct. 2748, 69 L.Ed. 2d 616 (1981) that the Plaintiff, Ms. Jensen, would not be entitled to recover punitive damages against the County Board members in their official capacities should she be successful on the underlying action brought pursuant to 42 U.S.C. Section 1983.

Although not addressed by counsel for the County Board, the court is constrained to raise sua sponte the viability of the plaintiff's claim against that entity under the South Carolina Wrongful Death Act, Sections

15-51-10, 15-51-20 and 15-51-40 of the Code of Laws of South Carolina 1976, as amended. As set forth in 5 C. Wright and A. Miller, Federal Practice and Procedure Section 1357 (1973): "Even if a party does not make a formal motion, the court on its own initiative may note the inadequacy of the complaint and dismiss it for failure to state a claim."

As noted previously, the doctrine of sovereign immunity prevails in the state of South Carolina. Belue v. City of Spartanburg, 276 S.C. 381, 280 S.E. 2d 49 (1981). Neither the state nor any of its political subdivisions can be held liable in an action ex delicto unless by express enactment of the General Assembly. Graham v. Charleston County School Board, 262 S. C. 314, 204 S.E.2d 384 (1974). Since there has been

no enactment of the General Assembly authorizing an action for wrongful death against a County Board of the Department of Social Services, plaintiff's pendent claim against that entity under the South Carolina Wrongful Death Act should be dismissed. See also, Belton v. Richland Memorial Hospital, 263 S.C. 446, 211 S.E.2d 241 (1975) and Chilton v. City of Columbia, 247 S.C. 407, 147 S.E.2d 642 (1966).

ALL DEFENDANTS

INDIVIDUAL CAPACITIES

Turning now to defendants' motions to dismiss as applied to their individual capacities, the court notes that the defendants largely, and correctly, rely on the doctrine of

qualified immunity from suit available to public officials under the recent United States Supreme Court decision of Harlow v. Fitzgerald, ____ U.S. ____, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982).[2]

In Harlow, the Supreme Court held:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Citing Procunier v. Navarette, 434 U.S. 555, 565, 98 S. Ct. 855, 861, 55 L.Ed.2d 24 (1978); Wood v. Strickland, 420 U.S. 308, 321, 95 S. Ct. 992, 1000, 43 L.Ed.2d 214 (1975). Id. at 102 S. Ct. 2738.

[2]It is perhaps important to make clear at the outset of this section that qualified immunity insulates public officials only from liability in their individual capacities. Hughes v. Blankenship, 672 F.2d 403 (1982). It is not available to a governmental official sued in his official capacity since that is treated as a suit against the entity. Universal Amusement Co. v. Hofheinz, 646 F.2d 996 (5th Cir. 1981).

Prior to Harlow, good faith immunity was available to public officials sued in their individual capacities in actions for damages unless (1) the official knew or reasonably should have known that the action he took within the sphere of his official responsibilities would violate the constitutional rights of the plaintiff or (2) he took the action with malicious intention to cause a deprivation of constitutional rights or other injury. Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed. 2d 214 (1975). The two prongs of this analysis were referred to as the "objective" and "subjective" elements, respectively. The Supreme Court in Harlow rejected the second exception to good faith immunity, the "subjective" element , noting that, "[t]he subjective element of the good

faith defense frequently has proved incompatible with our admonition in Butz [Butz v. Economou, 438 U.S. 478, 98 S. Ct. 2894, 57 L.Ed.2d 895 (1978)] that insubstantial claims should not proceed to trial." Harlow 102 S.Ct. at 2737.

Therefore, the court must proceed to analyze the availability of qualified immunity to the defendants under the "objective element" analysis set forth in Wood and clarified in Harlow. First, however, the court would like to address two points: The first is that the decision in Harlow, which involved a suit against a federal government official under the Constitution,, is equally applicable to suits against state officials sued in their individual capacities for constitutional violations under Section 1983. As set forth in footnote 30 of Harlow:

> This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under Section 1983. We have found previously, however, that it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under Section 1983 and suits brought directly under the Constitution against federal officials. (emphasis added). Butz v. Economou, 438 U.S., at 504. 98 S. Ct., at 2909.

Additionally, the Fourth Circuit, in the case of Ward v. Johnson, 690 F.2d 1098 (4th Cir. 1982), has proceeded to determine the availability of qualified immunity under the Harlow analysis to a state prison official sued under Section 1983. In Ward, the chairman of the prison adjustment committee was sued for an alleged violation of an inmate's constitutional right in the course of a disciplinary hearing. Although the en banc court

found that the chairman was entitled to absolute immunity, it also noted the following in a well-reasoned opinion by Judge Russell:

> Though we are convinced and so hold that the defendant Gardner under the facts of this case was entitled to absolute immunity from an award of damages in favor of the plaintiff, we would perhaps be remiss not to take note of the possibility that the defendant Gardner may have been likewise qualifiedly immune from damages liability. Id. at 1110.

Judge Russell then analyzed the availability of qualified immunity under the "objective element" test of Harlow, Butz, and Wood. The Court also notes that the Sixth Circuit, at the direction of the Supreme Court, has applied Harlow qualified immunity analysis to Ohio parole officers in a suit under Section 1983. Wolfel v. Sanborn, 691 F.2d 270 (1982).

The second point that the court would like to address concerns the availability of the defense of qualified immunity on a motion to dismiss. As set forth in the Fourth Circuit in Ward:

> Finally, it [the Supreme Court] concluded that it was appropriate for the judge (emphasis added) to 'determine, not only the currently applicable law, [and] whether that law was clearly established at the time an action occurred' and that, if the court determined that it was not 'clearly established' at that time, a grant of summary judgment, based on the officials qualified immunity right, was in order. quoting Harlow. Id, at 1111.

A motion for summary judgment and a motion to dismiss for failure to state a claim are, of course, very closely related, as the final sentence of Federal Rule of Civil Procedure 12(b) makes clear. Therefore, this court is convinced that the "threshold immunity question" is appropriate on a motion to dismiss. As the Fourth Circuit noted in

its analysis of Harlow: "It [the Supreme Court] proceeded to declare that '[u]ntil this threshold immunity question is resolved, discovery [or further proceedings in this case] should not be allowed.'" Ward at 1111.

Turning now to an analysis of the "objective element" of qualified immunity as it applies to the defendants sued in their individual capacities, the threshold question to be answered is whether the constitutional right which the plaintiff claims was violated by the defendants was "clearly established" at the time of the alleged violation. (emphasis added).

The Harlow standard is the objective element of qualified immunity announced in Wood v. Strickland, supra. Therefore, in attempting to determine whether a federal right is considered

"clearly established," reliable guidance can be drawn from the lower court decisions that have interpreted the objective test found in Wood. Smith, Qualified Immunity from Liability for Violations of Federal Rights - A Modification, The Institute of Government - Chapel Hill, N. C. (January, 1983).

The Plaintiff in the instant case contends that:

> Defendant clearly knew or should have known that not only was the Plaintiff's decedent entitled to his Fourteenth Amendment right to life but furthermore, Defendants knew or should have known that under the laws or customs of the State of South Carolina, more particularly by S. C. Code Section 20-7-640, et seq, (recodified in 1981), they were charged with an affirmative duty to investigate, care for, and protect the welfare of the Plaintiff's decedent. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at page 7.

However, an official's knowledge of

a general constitutional provision, such as the Fourteenth Amendment, does not always tell him whether proposed action or inaction would violate that general constitutional provision. The defense of qualified immunity depends instead on an analysis of whether the courts have decided that a particular right is included within the protection of a general constitutional provision. (emphasis added). Smith, supra. This important distinction was explored in the Supreme Court case of Procunier v. Navarette, 434 U.S. 555, 98 S. Ct. 855, 55 L.Ed. 2d 24 (1978) and also noted in the lower court decisions of Sullivan v. Meade Independent School District, 530 F.2d 799 (8th Cir. 1976) and Tate v. Alexander, 527 F. Supp. 796 (M.D. Tenn. 1981).

Therefore, in the instant case, the

question is not whether the defendants knew or should have known of the general Fourteenth Amendment prohibition against the deprivation of life without due process of law. The question is whether the law at the time of the incident complained of "clearly established" that their failure to promulgate and implement training programs for social workers dealing with abusive parents or their failure to adequately supervise the workers rendered them liable to a child subsequently killed by its parents for the deprivation of its Fourteenth Amendment right ot life.

Whether or not a federal constitutional right is "clearly established" at the time of the alleged wrongful acts depends on a review of the opinions of the Supreme Court, the appropriate court of appeals and of the highest court of the state involved

Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980). The plaintiff has drawn the court's attention to the 1981 case of Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981), a case which involved an action against a placement agency for the failure to protect an abused child from beatings and sexual abuse inflicted by her foster father. The Doe case does present a factual situation in some ways analogous to the case at hand and suggests that a cause of action would lie under Section 1983 against an agency charged with default in the exercise of an affirmative duty if (1) the omission was a substantial factor leading to the denial of a constitutionally protected liberty or property interest and (2) the officials in charge of the agency being sued displayed a mental state of

"deliberate indifference" in order to "meaningfully be termed culpable under Section 1983." (emphasis added). [cites omitted]. Id. at 141. However, this case post-dates the acts complained of herein by two years and is, therefore, irrelevant for purposes of our analysis in that Harlow holds:

> If the law at the time was not clearly established, an official could not reasonably be expecated to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. . . .
>
> . . . The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an officials acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's

> duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."
>
> [citing] Pierson v. Ray, 386 U.S. 547, 554, 87 S. Ct. 1213, 1217, 18 L.Ed. 2d 288 (1967). (emphasis added). Harlow, 102 S. Ct. at 2739.

Plaintiff would also assert that defendants' inaction subjects them to liability for the deprivation of decedent's life pursuant to the duties imposed by Section 20-7-640 et seq. of the South Carolina Code of Laws 1976, as amended. It is true that Sections 20-7-640 and 20-7-650 outline the general responsibilities of the Department of Social Services and the local agency with respect to reporting and referral of cases of child abuse, the promulgation of programs, the facilitation research in the area, and the staffing and training of its

investigative services. However, the court is not of the opinion that notice of these duties is tantamount to a conclusion that the law "clearly established" that the defendants' failure to provide adequate training for social workers responsible for detecting child abuse or failure to supervise would subject them to liability under the Fourteenth Amendment of the United States Constitution.

It can hardly be said that in May of 1979 the law "clearly established" that an action for civil liability premised under the Fourteenth Amendment would lie against a state or county department of social services board member or home health care nurse for the failure to adequately train or supervise social workers dealing with abusive parent(s) when this court is not convinced in March of 1983 that such a

cause of action exists. If this judge of a federal court is uncertain, is it fair to find the defendants liable because they, too, were uncertain? Ward v. Johnson, 690 F.2d 1098 (4th Cir. 1982). This court finds that the State Board members, the County Board members, and Barbara Locklair, sued in their individual capacities are entitled to the defense of qualified immunity as set forth in Harlow and does hereby grant their motions to dismiss as to all causes of action alleged in the complaint. (emphasis added).

For the foregoing reasons and in view of the cited authorities,

IT IS HEREBY ORDERED that the complaint be dismissed in its entirety as against the Commissioner, the members of the State Board of the Department of Social Services and Barbara Locklair

sued in both their official and individual capacities.

IT IS FURTHER ORDERED that the complaint as it asserts a cause of action against the members of the Richland County Board of the Department of Social Services in their individual capacities be dismissed in its entirety.

IT IS FURTHER ORDERED that the cause of action under the South Carolina Wrongful Death Act, Sections 15-51-10, 15-51-20 and 15-51-40 of the Code of Laws of South Carolina 1976, as amended, be dismissed as against the members of the Richland County Board of the Department of Social Services sued in their official capacities.[3]

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[3]As it remains, plaintiff's complaint asserts causes of action against the

IT IS SO ORDEREED this 4th day of March, 1983, at Columbia, South Carolina.

s/ Clyde H. Hamilton
United States District Judge.

members of the Richland County Board of the Department of Social Services sued in their official capacities under 42 U.S.C. Sections 1983 and 1988.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Karole K. Jensen, as Administratrix of the Estate of Sylvia R. Brown, Deceased, Plaintiff, vs. Virgil L. Conrad, in his individual and official capacity as Commissioner of the Department of Social Services; Robert Kneece, Fred G. Scott, Samuel Smith, Agnes Wilson, Oscar P. Butler, Jr., John C. Williams, Jr., and Lucy C. Trower, individually and in their official capacities as members of the State Board of the Department of Social Services; Collie L. Moore, W. H. Neal, Catherine Morris, Allen Dowdy, Arlene	NO. 82-2061-15 SUPPLEMENTAL ORDER

B. Andrews, Beatrice)
Sumter, Robert E.)
Alexander, Melissa)
Burnette, individ-)
ually and in their)
official capacities)
as members of the)
Richland County)
Board of the Depart-)
ment of Social)
Services; Mary)
Williams and)
Patricia Jones,)
individually and in)
their official capa-)
cities as Social)
Workers for the)
South Carolina)
Department of Social)
Services; and)
Barbara Locklair,)
individually and in)
her official)
capacity as a "Home)
Health Nurse"for the)
South Carolina)
Department of)
Social Services,)
Defendants.)
_____)

This matter is before the court upon plaintiff's two-pronged motion: to amend or alter this court's judgment of March 4, 1983, and for leave to file an amended complaint. These motions are

brought pursuant to Rule 59(e) and Rule 15(a) of the Federal Rules of Civil Procedure, respectively. Rule 59 generally provides for the grant of a new trial or for the alteration or amendment of a judgment (emphasis added). This court's order of March 4, 1983, did not result in a judgment against the plaintiff since the court did not direct the entry of final judgment pursuant to Rule 54(b). Nonetheless, under the court's inherent power to reconsider and revise any interlocutory order, as recognized by Rule 54(b), the court has considered in great detail the arguments set forth by the plaintiff in her motion and accompanying memoranda. Upon serious reconsideration of the matter, the court adheres to and does hereby expend the scope of its ruling of March 4, 1983.

After hearing oral argument on the instant motion to reconsider/amend on June 28, 1983, and conducting extensive research on the claims presented by the plaintiff in her complaint filed August 16, 1982, her memoranda in support of the instant motion, and in her proposed amended complaint, as submitted to the court on February 25, 1983, the court is of the considered opinion that this plaintiff has failed entirely to state a cause of action under 42 U.S.C. Section 1983 against any of the defendants named in the complaint.[1] While the court notes

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[1]The dismissal of the plaintiff's action under 42 U.S.C. Section 1983 will, of course, result in a dismissal of her claim for attorney's fees pursuant to 42 U.S.C. Section 1988 since she is not entitled to such fees until she has "prevailed on the merits of at least some of [her] claims." Hanrahan v. Hampton, 446 U. S. 754, 758, 100 S. Ct. 1987, 1989, 64 L.Ed. 2d 670 (1980).

Morris, Andrews, Sumter, Alexander, Burnett and later joined by defendant Dowdy) and the third motion to dismiss filed on January 13, 1983, (by defendant Locklair) were never joined by defendants Williams and Jones, the court is constrained to conclude that the complaint fails also to state a claim against these two latter defendants.[2] As set forth in 5 C. Wright and A. Miller, Federal Practice and Procedure Section 1357 (1973), "Even if a party does not make a formal motion, the court on its

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[2]The court also notes that as of June 28, 1983, the date of oral argument on the instant motion, the Defendant Patricia Jones had not been served with a summons and complaint in this action. A motion to dismiss pursuant to Rule 41(b) and Proposed Rule 4(j) was filed on her behalf on March 11, 1983. However, because the court is of the opinion that the action should be dismissed as to all parties, Ms. Jones' motion need not be reached.

own initiative may note the inadequacy of the complaint and dismiss it for failure to state a claim."

In response to the various motions to dismiss filed in late 1982 and early 1983 by the defendants herein, the court heard oral argument on February 25, 1983. On March 4, 1983, the court issued its ruling wherein the plaintiff's claim was dismissed in its entirety against the Commissioner of the South Carolina Department of Social Services, the members of the State Board of the Department of Social Services, and Barbara Locklair, such dismissal being based on the applicability of eleventh amendment immunity afforded to the states under the United States Constitution and the doctrine of "qualified immunity."[3] The complaint was

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[3] Harlow v. Fitzgerald, ___ U. S. ___, 102 S. Ct. 2727, 73 L.Ed. 2d 396 (1982).

also dismissed against the members of the Richland County Board of the Department of Social Services sued in their individual capacities under the doctrine of "qualified immunity." The plaintiff's pendent state claim under the South Carolina Wrongful Death Act, Sections 15-51-10, 15-51-20 and 15-51-40 of the Code of Laws of South Carolina 1976, as amended, was dismissed on the basis of South Carolina's doctrine of sovereign immunity. See also United Mine Workers of America v. Gibbs, 383 U. S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966).

As it remained, the plaintiff's complaint of August 16, 1982, asserted causes of action under 42 U. S. C. Section 1983 and 1988 against the members of the Richland County Board sued in their official capacities and against defendants Mary Williams and

Patricia Jones, sued both officially and individually, inasmuch as they had filed no motions to dismiss. By way of reiteration, the court now is of the opinion that not only were the above named defendants properly dismissed for the reasons set forth in the court's order of March 4, 1983, but that all defendants named in the plaintiff's complaint are entitled to dismissal pursuant to Rule 12(b)(6) of the Federal rules of Civil Procedure for failure to state a claim upon which relief may be granted.

DISCUSSION

The plaintiff, Karole K. Jensen, has attempted to assert a cause of action under 42 U. S. C. Section 1983 against the above named officials for

the wrongful death of her decedent, Syliva R. Brown, a minor child who was the victim of parental child abuse. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any cittzen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other propre proceeding for redress. (emphasis added).

As set forth by the United States Supreme court, "[t]he first inquiry in any Section 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws' of the United States." Martinez v. California, 444 U.S. 277, 284, 100 S. Ct. 553, 558, 62 L.Ed.2d 481 (1980), quoting Baker v. McCollan, 443 U.S.

137, 140, 99 S. Ct. 2689, 2692, 61 L.Ed. 2d 433 (1979). Section 1983 is a remedial statute only, (emphasis added). It provides remedy only, and the substantive right must be found in the Constitution and laws. Chapman v. Houston Welfare Rights Organization 441 U.S. 600, 99 S. Ct. 1905, 60 L.Ed.2d 508 (1979). In 1980, the U. S. Supreme Court held that the phrase "secured by the Constitution and Laws" includes federal statutory law as well as the Constitution. Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L.Ed 2d 555 (1980). The plaintiff herein contends that her deceased was deprived of her fourteenth amendment "right to life" and of rights secured under 42 U.S.C. Section 5104 et seq., The Child Abuse Prevention and Treatment Act of 1974,

and 42 U.S.C. Section 620 (Part B of Title IV of the Social Security Act).[4]

FOURTEENTH AMENDMENT

Turning first to the plaintiff's constitutional claim: the plaintiff contends that (1) the failure of the Commissioner and the State and County Boards of the South Carolina Department of Social Services to promulgate guidelines for social workers dealing with abused children and to adequately

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[4]The plaintiff does not specifically assert either of the above cited statutes in her complaint or proposed amended complaint. However, since she does allege in her original complaint that the action is brought pursuant to "the constitution and laws" of the United States and does address the specific statutes in her present motion before the court, the court will fully discuss the applicability of these statutes infra.

train and supervise such social workers and (2) the failure of the social workers themselves to adequately protect the infant Sylvia R. Brown, deprived her decedent of her fourteenth amendment right not to be deprived of life without due process of law. Complaint at Paragraphs 8 and 19. "Although the right to life is obviously an interest of constitutional dimension, its deprivation alone - cannot give rise to a claim under section 1983." Dollar v. Haralson County, Ga., 704 F.2d 1540 (11th Cir. 1983).

The fourteenth amendment to the United States Constitution provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added).

Since the amendment is directed to the states, it can be violated only by conduct that may be fairly characterized as state action (emphasis added). Lugar v. Edmondson Oil Co., Inc., ___ U.S. ___, 102 S. Ct. 2744, 73 L.Ed2d 482 (1982). As the Supreme Court asserted in Jackson v. Metropolitan Edison Co., 419 U. S. 345, 349, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974):

> In 1883, this Court in the Civil Rights Cases, 109 U.S. 3 [3 S. Ct. 18, 27 L.Ed. 835], affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield.

In 1982, the United States Supreme Court reaffirmed this essential dichotomy between "state action" and

private conduct in the cases of Lugan v. Edmondson Oil Co., ___ U. S. ___, 102 S. Ct. 2744, 73 L.Ed.2d 482 (1982); Rendell-Baker v. Kohn, ___ U.S. ___, 102 S. Ct. 2764, 73 L.Ed.2d 418 (1982) and Blum v. Yaretsky, ___ U.S. ___, 102 S. Ct. 2777, 73 L.Ed.2d 534 (1982). In Lugar the court set forth:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order. (emphasis added). 102 S. Ct. at 2754.

Gary C. Leeds, professor of law at the T. C. Williams School of Law of the University of Richmond, explored in great detail the development of the doctrine of "state action" and the limitation it imposes on federal courts in the North Carolina Law Review article entitled, State Action Limitations on Courts and Congressional Power. 60 N.C.L. Rev. 747 (1982). In the article, Professor Leeds sets forth an admonition which, in the court's opinion, has particular application to the case at hand:

> Because of the state action doctrine, courts cannot reach most abridgments of liberties by individuals. This limitation, however unjust on occasion, is consistent with several vital principles in our system of government that should not be lightly disregarded in order to achieve a particular "good" result

in a hard case. Id. at 752.

Karole K. Jensen, the plaintiff herein, presents to the court an emotionally compelling argument; child abuse is a most noxious social evil that demands serious consideration and concerted action to stem its widespread existence. However, it has been of great concern to this court since the inception of the instant case that plaintiff's decedent, Sylvia Brown, was deprived of her life by her parent, a private individual. (emphasis added). As the Supreme Court has repeatedly held, purely private discriminatory conduct, although wrongful and reprehensible, is not prohibited by the fourteenth amendment. Shelley v. Kraemer, 334 U.S. 1, 13, 68 S. Ct. 836, 92 L.Ed. 1161 (1948). While the court observes that there was some state

involvement with the plaintiff's decedent prior to her death in May of 1979, the finding of some incidental state action is not the end of the inquiry. The crucial judicial inquiry is whether the state and thereby, its officials, should be held responsible, whether the alleged infringement of the plaintiff's decedent's federal right by her parent is "fairly attributable to the state". Lugar, 102 S. Ct. at 2754. See also Peterson v. City of Greenville, 373 U.S. 244, 83 S. Ct. 1119, 10 L.Ed.2d 323 (1963).

At the outset of the court's inquiry, the court notes that Judge William W. Wilkins of this district held in the case of Karole K. Jensen, as Administratrix of the Estate of Michael Clark v. Conrad, et al., C.A. No. 82-2059-14, by order of June 16, 1983,

that the due process clause of the fourteenth amendment constituted an appropriate federal basis for a suit brought under 42 U.S.C. Section 1983 by the plaintiff herein in the Anderson division. Although the factual setting in Clark differed substantially from the case at hand, the plaintif's theory of liability was virtually identical to that asserted herein. Although Judge Wilkins found the necessary "state action" to support a fourteenth amendment violation, this court is not absolutely bound by his determination in Clark. While this court might find his opinion highly persuasive on the issue, "a District court decision which has not stood the acid test of appellate review cannot be regarded as authoritative, much less dispositive . . . ." Bank of Marin v. England, 352 F.2d 186, 189,

n.1 (9th Cir. 1965), reversed on other grounds, 385 U.S. 99, 87 S. Ct., 274, 17 L.Ed.2d 197 (1966).

Cases involving "state action" analysis arise from a variety of factual backgrounds. However, the instant case is "obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the state so as to make it 'state' action for the purposes of the Fourteenth Amendment." [cites omitted]. Blum v. Yaretsky, 102 S. Ct. at 2785. This case also differs from "state action" cases in which state officials enforced state laws and regulations, for example, garnishment or attachment statutes, at the behest of a private individual. "[I]n such cases the question typically is whether the

private motives which triggered the enforcement of those laws can fairly be attributed to the State." [cites omitted]. Id. Here, the plaintiff Karole K. Jensen, as did the plaintiffs in Blum, seeks to hold state officials liable for the action of a private party, Sylvia R. Brown's mother.

In Blum, a class of Medicaid patients who were residents of a private New York nursing home brought an action alleging that they had not been afforded adequate notice of decisions made by nursing home officials to transfer them to lower level care facilities or notice of their right to an administrative hearing to challenge those decisions. The plaintiffs asserted that these omissions were in violation of their fourteenth amendment right of due process. The state of New York

subsidized the costs of the private facility, paid the expenses of patients, licensed the facility and required extensive reporting of all transfer decisions. Additionally, when the patients were transferred to lower level care facilities, the state correspondingly reduced their Medicaid benefits. Despite this substantial state involvement, the Court refused to find the requisite "state action" necessary to hold the state defendants liable for the transfer decisions and thus, for a fourteenth amendment violation. Id. at 2790.

In so holding, the Supreme Court in Blum outlined three important points with respect to the essential "state action" analysis required when a party asserts a fourteenth amendment violation. First, the Court noted:

> [A]lthough it is apparent that nursing homes in New York are extensively regulated, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." Jackson v. Metropolitan Edison Co., supra. 419 U.S. at 350, 95 S. Ct., at 453. The complaining party must also show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Id., at 351, 95 S. Ct., at 453. The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties. (emphasis in the original). Blum v. Yaretsky, 102 S. Ct. at 2786.

The Court next asserted an important principle which is specifically applicable to, if not controlling in, the case at hand:

> [A]lthough the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. [cites omitted]. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment. [cites omitted], (emphasis added). Id. at 2786.

The third point noted by the Court in Blum has no application to the case at hand for it could hardly be said that the private entity herein has exercised powers that are "traditionally the exclusive prerogative of the State." Blum citing, Jackson v. Metropolitan Edison Co., supra, at 353, 95 S. Ct., at 454; see Flagg Bros., Inc. v. Brooks, 436 U. S. 149, 157-161, 98 S. Ct. 1729, 1733-36, 56 L.Ed.2d 185 (1978). Cases

under this line of analysis generally fall within what is commonly known as the "public function doctrine"; private entities performing functions traditionally performed by government. Marsh v. Alabama, 326 U. S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946).

In applying the Blum analysis to the case at hand, the plaintiff would assert that the state and county officials' responsibility for her decedent's death arises from the duties imposed by South Carolina statutory law, found at Sections 20-7-640 and 20-7-650 of the South Carolina Code of Laws 1976, as amended.[5] Section 20-7-640 outlines the duties of the State Department of

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[5]The plaintiff has never, by memorandum, through oral argument or otherwise,

Social Services and Section 20-7-650 details the duties of the local child protective agency, here, the Richland County Board of the Department of Social Services. As previously set forth in this court's order of March 4, 1983, Sections 20-7-640 and 20-7-650 outline the general responsibilities of the state department and the local agency with respect to reporting and referral of cases of child abuse, the promulgation of programs, the facilitation of research in the area,

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specifically asserted her theory of "state action" on which she bases her claim of a fourteenth amendment violation. Therefore, the court must proceed, in an admittedly speculative fashion, to apply the "state action" analysis set forth by the United States Supreme Court to the situation at hand.

and the training of their investigative personnel. The more specific duties imposed by these sections are found in Section 20-7-650 wherein the local agency is charged with investigating a report of suspected abuse or neglect within twenty-four hours of its receipt and with making its findings with respect to such reported abuse within sixty days. Section 20-7-650(C). The agency is required to communicate cases of indicated abuse to the Statewide Central Registry, Section 20-7-650(E), and in such cases of indicated abuse, the agency is charged in subsection (G) with, ". . . providing, directing or coordinating then appropriate and timely delivery of services to children found to be abused or neglected and those responsible for their care or others exercising temporary or permanent

control over such children . . . ." Additionally, if such protective services are initiated, the agency is required to notify the Family Court of the jurisdiction for the purpose of scheduling a hearing as to the reasonableness of such offered services. Section 20-7-650(H).

The court acknowledges that these statutes impose certain duties upon the state and local agencies with regard to the investigation of child abuse and the subsequent provision of services. However, the court is not convinced that these statutes amount to "regulation" of the conduct of a parent abuser or coercion or significant encouragement of his or her conduct so as to provide the required "state action" under the fourteenth amendment. As set forth

previously, "state action" is an essential preliminary condition to Section 1983 jurisdiction, and failure to find "state action" will require dismissal of the case. Martinez v. California, 444 U. S. 277, 283-85, 100 S. Ct. 553, 558-59, 62 L.Ed. 2d 481, 488-89 (1980) and Hall v. Quillen, 631 F.2d 1154 (4th Cir. 1980).

Clearly, these statutes do not "regulate" private individuals within the scope of the analysis set forth by the Supreme Court in Jackson v. Metropolitan Edison, Co., supra, or Blum v. Yaretsky, supra. Indeed, the court is instructed by the Supreme Court instead to focus upon whether, by virtue of Sections 20-7-640 and 20-7-650 and the duties imposed therein, the state agency, the local agency or the social workers themselves have, ". . . exercised coercive power or [have]

provided such significant encouragement, either overt or covert, that the choice [of the decedent's parent] must in law be deemed to be that of the State." Blum v. Yaretsky, 102 S. Ct. at 2786. It would indeed be ludicrous to suggest that the state or any of its officials coerced or encouraged, in an respect, the abuse and subsequent killing of plaintiff's decedent. The statutes and the very existence of the state and local agencies are directed toward the protection of such children. Subsection (A) of Section 20-7-650 provides: "It is the purpose of this section to encourage the voluntary acceptance of any service offered by the child protective service agency in connection with child abuse and neglect, or any other problem of a nature affecting the stability of family life." (emphasis added).

The court understands that part of the plaintiff's claim rests upon a claim of inaction or insufficient action by the defendants herein; that the defendants simply failed to adequately protect the decedent, Sylvia R. Brown, from her abusive parents. The plaintiff, as did Judge Wilkins in his previously mentioned order of June 16, 1983, relies heavily on the case of Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981). The Second Circuit in Doe did not address the issue of "state action" under the fourteenth amendment, but in this court's mind there are two crucial distinctions between Doe and the case at hand for purposes of "state action" analysis. In Doe, as in Blum, the private entity (the foster home and thereby, the foster father, in Doe and

the private nursing home in Blum) was subject to direct state regulation.[6] Both were state licensed private entities. While the Court in Blum noted that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment, " quoting Jackson v. Metropolitan Edison Co., 419 U.S. at 350, 95 S. Ct. at 453, the close and continuing supervisory relationship

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[6]As a placement agency, [the New York City Department of Social Services] was charged by state law with the task of periodically inspecting and annually recertifying the Senerchia home. (New York Social Services Law Sections 376, 378)(McKinney). Its alleged failure to perform this duty is the gravamen of plaintiff's complaint." Doe, 649 F.2d at 137.

between the state agency and the foster father in Doe would probably satisfy "state action" analysis under Blum and Jackson.

In the instant case, the court is of the opinion that there is not a sufficiently close nexus between the state of South Carolina and Sylvia Brown's mother so that the action of the latter may be fairly treated as that of the state. Blum, 102 S. Ct. at 2786. While the state may offer "services" to an abusive parent, the parent is in no sense under the obligatory control of the state and is not even required to accept such "services" as the agencies may offer. As set forth in Sections 20-7-650(J) of the South Carolina Code of Laws 1976, as amended:

> If at any time after the initiation of protective services by the agency those receiving services

> indicate a refusal to cooperate, the agency shall withdraw. If the facts so warrant, the agency may petition the Family Court to invoke the jurisdiction of the court under the Family Court Act to intervene, but in no case shall the agency threaten such action to coerce participation. (emphasis added).

Absent intervention by the Family Court of the jurisdiction, the parent of an abused child may accept or reject, at his or her own will, the offered guidance of the state. This court is unwilling to convert non-obligatory state supervision or guidance into "regulation" in order to hold the state responsible for the acts of Sylvia R. Brown's mother under the fourteenth amendment. Blum, 102 S. Ct. at 2786. To stretch the concept of "state action" so far would, in essence, require a finding of "state action" in every instance of state involvement with a private individual.

The second and very important distinction between the case at hand and the Doe case is the fact that the child in Doe was in the legal custody of the state of New York. (emphasis added). Sylvia R. Brown was in no respect in the custody of the state of South Carolina. The agency had not, to this court's knowledge, even initiated proceedings under Section 20-7-736, which provides the Family Court of a particular jurisdiction with the power to remove a child from its parent's custody only upon a showing by clear and convincing evidence that the child cannot be protected from further harm without being so removed.

Legal custody is a parental right that is not to be lightly disregarded:

> It is a right protected both by the common law and by statutes. Since the right of parents to the custody

> of their minor children is both a natural and a legal right, the law should not disturb the parent-child relationship except for the strongest reasons, and only upon a clear showing of a parent's gross misconduct or unfitness, or of other extraordinary circumstances affecting the welfare of the child. 59 Am.Jur.2d Parent and Child Section 25 (1971).

However, once that right is legally forfeited and the state assumes custody, the state then is charged with "affirmative duties, the non-feasance of which may violate the constitution." Doe, 649 F.2d at 141. This court is of the opinion that while the state and county officials may have been under a legal duty to offer protective services to the custodians of abused children, absent legal custody of a child by the state, the officials had no general duty to unequivocally ensure the safety of that child twenty-four hours a day. As stressed by the Eleventh Circuit in

Dollar v. Haralson County, Ga., 704 F.2d 1540 (11th Cir. 1983):

> In determining whether a constitutional deprivation has occurred, courts must examine whether the defendant was under any obligation to the particular plaintiff. The question of the existence of such a duty is an issue of law. The court, not the jury, must determine "whether, upon the facts in evidence, [a duty] exists between the parties that the community will impose a legal obligation upon one for the benefit of the other." W. Prosser Handbook of the Law of Torts 206 (1971). The duty focuses upon the relationship. (emphasis added). Id. at 1543.

The relationship between these officials and the plaintiff's decedent was legally insufficient to impose upon them the legal obligation of, in essence, becoming the absolute insurers of Sylvia R. Brown's safety. The duties of the defendants in this situation were to conduct an investigation and offer their services to the decedent's legal

custodian. If they performed these duties negligently, that is a matter of state tort law. Therefore, the court is of the opinion that legal custody and/or direct supervisory control over or regulation of the parent or caretaker are necessary prerequisites to a finding of "state action," for the purposes of the fourteenth amendment, in the instant case. As set forth by the Seventh Circuit Court of Appeals in the 1982 case of Bowers v. DeVito, et al., 686 F.2d 616 (1982):

> There is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law. Brazier v. Cherry, 293 F.2d 401, 404-05 (5th Cir. 1961). But there is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators

> but it does not violate the due process clause of the Fourteenth Amendment, or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone, it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order. (emphasis added). Id. at 618.

The plaintiff's decedent's right to life was protected by the fourteenth amendment, but it only protected her from deprivation by the "State . . . of life . . . without due process of law." Although the state's offer of protective services was action by the state, the deprivation of the decedent's life cannot be fairly characterized as "state action." Regardless of whether, as a matter of state tort law, the state and local boards of the Department of Social Services, the commissioner, Barbara Locklair and the social workers,

Williams and Jones, could be said to have had a "duty" to avoid harm to the infant or to have proximately caused her death, the court does hereby find that the defendants did not "deprive" the plaintiff's decedent of life within the meaning of the fourteenth amendment. Martinez v. State of California, 100 S. Ct. at 559. For the foregoing reasons, the court concludes that the plaintiff has failed to state a constitutional claim for which relief may be afforded under 42 U. S. C. Section 1983, as against all defendants.

STATUTORY CLAIM

The plaintiff next contends that her decedent was deprived of "rights" secured under the Child Abuse Prevention and Treatment Act of 1974, codified at

42 U.S.C. Section 5101 et seq., and Part B. of Title IV of the Social Security Act, 42 U.S.C. Section 620 et seq. In 1980, the United States Supreme Court construed 42 U.S.C. Section 1983 as authorizing suits to redress violations by state officials of rights (emphasis added) created by federal statutes. Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L.Ed. 2d 555 (1980); see also Middlesex County Sewerage Authority, et al. v. National See Clammers Association, 453 U.S. 1, 101 S. Ct. 2615, 69 L.Ed. 2d 435 (1981).

However, in order to assert a cause of action under 42 U.S.C. Section 1983 for the violation of a federal statute, that statute must create a "right, privilege or immunity" within the meaning of Section 1983. The issue in the instant case then becomes; did the

plaintiff's decedent have any "rights" secured by the Child Abuse Prevention and Treatment Act of 1974 or Part B of Title IV of the Social Security Act. Thiboutot only grants the plaintiff a cause of action under Section 1983 if the statutes afforded her decedent a substantive "right."

The statutes cited by the plaintiff deal with the appropriation of federal funds to states for child welfare services, 42 U.S.C. Section 620 et seq., and more specifically, for services directed toward the prevention of child abuse, 42 U.S.C. Section 5101 et seq. Section 5103 of the Child Abuse Prevention and Treatment Act provides in pertinent part:

> (b) Grants to States; qualifications for assistance; reduction of awards; compliance of social security provisions with certain requirements

(1) The Secretary, through the Center, is authorized to make grants to the States for the purpose of assisting the States in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs.

In order for a State to qualify for assistance under this subsection, such State shall-

(A) have in effect a State child abuse and neglect law which shall include provisions for immunity for persons reporting instances of child abuse and neglect from prosecution, under any State or local law, arising out of such reporting;

(B) provide for the reporting of known and suspected instances of child abuse and neglect;

(C) provide that upon receipt of a report of known or suspected instances of child abuse or neglect an investigation shall be initiated promptly to substantiate the accuracy of the report, and upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child, as well as that of any other child under the same care who may be

in danger of abuse or neglect;

(D) demonstrate that there are in effect throughout the State, in connection with the enforcement of child abuse and neglect laws and with the reporting of suspected instances of child abuse and neglect, such administrative procedures, such personnel trained in child abuse and neglect prevention and treatment, such traianing procedures, such institutional and other facilities (public and private), ;and such related multidisciplinary programs and services as may be necessary or appropriate to assure that the tate will deal effectively with child abuse and neglect cases in the State;

(E) provide for methods to preserve the confidentiality of all records in order to protect the rights of the child, his parents or guardians;

(F) provide for the cooperation of law enforcement officials, courts of competent jurisdiction, and appropriate State agencies providing human services;

(G) provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such

proceedings;

(H) provide that the aggregate of support for programs or projects related to child abuse and neglect assisted by State funds shall not be reduced below the level provided during fiscal year 1973, and set forth policies and procedures designed to assure that Federal funds made available under this subchapter for any fiscal year will be so used as to supplement and, to the extent practicable, increase the level of State funds which would, in the absence of Federal funds, be available for such programs and projects;

(I) provide for dissemination of information to the general public with respect to the problem of child abuse and neglect and the facilities and prevention and treatment methods available to combat instances of child abuse and neglect; and

(J) to the extent feasible, insure that parental organizations combating child abuse and neglect receive preferential treatment.

If a State has failed to obligate funds awarded under this subsection within eighteen months after the date of award, the next award under this subsection made after the expiration of such period shall be

reduced by an amount equal to the amount of such unobligated funds unless the Secretary determines that extraordinary reasons justify the failure to so obligate.

3) Programs or projects related to child abuse and neglect assisted under part A or B or title IV of the Social Security Act shall comply with the requirements set forth in clauses (B), (C), (E), and (F) of paragraph (2). (emphasis added).

Part B of Title IV of the Social Security Act generally provides for the appropriation to the individual states of a designated sum of money each fiscal year, "For the purpose of enabling the United States, through the Secretary, to cooperate with State public welfare agencies in establishing, extending, and strengthening child-welfare services . . . ." 42 U.S.C. Section 620, "Child-welfare services" include "public social services which supplement, or substitute for, parental care and

supervison for the purpose of (1) preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children, . . ." 42 U.S.C. Section 625.

These statutes do address by means of federal appropriations, the problem of child abuse and neglect in the individual states. However, the fact that abused children are the in direct recipients of federal largess does not, in and of itself, create enforceable "rights" in the statute itself. Perry v. Housing Authority of the City of Charleston, 664 F.2d 1210 (4th Cir. 1981). The plaintff has not directed the court to any substantive provision of the two acts which would have given her decedent a tangible right to the unqualifiedly protected from, or free

from abuse within the contemplation of Section 1983.

The situation involved in this case is closely analogous to that in the recent Supreme Court decision of Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S. Ct. 1531, 67 L.Ed.2d 694 (1981). In Pennhurst, the Court held that the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (42 U.S.C. Section 6000 et seq.,) created no substantive rights to "appropriate treatment" in the "least restrictive" environment for mentally retarded persons. In so holding, the Court asserted:

> There is virtually no support for the lower court's conclusion that Congress created rights and obligations pursuant to its power to enforce the Fourteenth Amendment. The Act nowhere states that that is its purpose. Quite the contrary, the Act's language and structure demonstrate that it

is a mere federal-state funding statute. (emphasis added). Id. 67 L.Ed. at 708.

The Fourth Circuit had the opportunity to apply the Supreme Court's Pennhurst ruling in the 1981 case of Perry v. Housing Authority of Charleston, 664 F.2d 1210 (4th Cir. 1981). In Perry, the court concluded that the United States Housing Act of 1937 did not created any legally cognizable "rights" in tenants of programs funded under the housing statutes and consequently, disallowed any action under 42 U.S.C. Section 1983.

A thorough review of the language, structure and legislative histories of both the Child Abuse Prevention and Treatment Act of 1974 and Part B of Title IV of the Social Security Act reveal that they too are but mere federal-state funding statutes. Indeed,

the first sentence of the legislative history of the Child Abuse Prevention Act reads:

> The Committee on Education and Labor, to whom was referred the bill (S.1191) to provide financial assistance for a demonstration program for the prevention, identification, and treatment of child abuse and neglect, to establish a National Center on Child Abuse and Neglect, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass. (emphasis added). 1974 U. S. Code Congressional and Administrative News, p. 2763.

The federal statutes cited by the plaintiff in her memorandum in support of her motion afforded her decedent no "rights, privileges, or immunites" within the meaning of 42 U.S.C. Section 1983. Middlesex, supra; Pennhurst, supra and Perry, supra. As set forth previously, 42 U.S.C. Section 1983 itself creates no substantive rights,

such "rights", if any exist, must be found in the Constitution and laws of the United States. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617, 99 S.Ct. 1905, 1915, 60 L.Ed. 2d 508 (1979).

The plaintiff also bases her statutory claim in part on regulations under Part B of Title IV of the Social Security Act. However, since the regulations were promulgated under the statute, they cannot exceed its substantive scope and create an enforceable right when the court has determined that the statute itself creates no such "right." Dopico v. Goldschmidt, 518 F. Supp. 1161 (S.D.N.Y. 1981).

Therefore, the court concludes that the plaintiff has also failed to assert a cognizable claim against any of the

defendants named herein under 42 U. S. C. Section 1983 for a violation of a "right secured by the laws of the United States."

CONCLUSION

The court has considered, in great detail, the claims asserted by the plaintiff, Karole K. Jensen in her motion to reconsider/amend as filed March 14, 1983. Additionally, the court has thoroughly reviewed the plaintiff's proposed amended complaint, as submitted to the Court on February 25, 1983. The plaintiff's proposed amended complaint sets forth more completely the facts surrounding her decedent's death. However, it does not alter the legal

theories upon which she proceeds.[7] Nonetheless, the additional facts asserted in the proposed amended complaint do not alter this court's opinion with regard to the existence of "state action" in this case or as they would apply to any claimed statutory infringement. Therefore, the court does hereby deny the plaintiff's motion to amend the complaint.

With regard to the plaintiff's motion to alter or amend its "judgment"

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[7]The plaintiff did assert an eighth amendment claim in her proposed amended complaint. However, at oral argument held June 28, 1983, the plaintiff's counsel candidly and correctly acknowledged that the factual situation presented herein could not support a claimed eighth amendment violation within the meaning of 42 U.S.C. Section 1983.

of March 4, 1983, the court notes that today's ruling was perhaps foreshadowed by the court in its March 4, 1983, order wherein it was stated:

> It can hardly be said that in May of 1979 the law "clearly established" that an action for civil liability premised under the Fourteenth Amendment would lie against a state or county department of social services board member or home health care nurse for the failure to adequately train or supervise social workers dealing with abusive parent(s) when this court is not convinced in March of 1983 that such a cause of action exists. (emphasis added). Order of March 4, 1983 at 20.

For the foregoing reasons and based on the cited authorities, the court concludes that the plaintiff has failed to assert either a constitutionally or statutorily protected "right" within the meaning of 42 U.S.C. Section 1983. The court adheres to its ruling of March 4, 1983, in that the parties were properly dismissed for the reasons set forth

therein. However, the court is now of the opinion that all parties to this action should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for the plaintiff's failure to assert a claim upon which relief may be granted.

IT IS THEREFORE ORDERED that plaintiff's motion to alter or amend judgment and to amend the complaint is hereby denied.

IT IS FURTHER ORDERED that the complaint be, and the same hereby is, dismissed as to all defendants named herein pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED this 18th day of July, 1983, at Columbia, South Carolina.

Clyde H. Hamilton
United States District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

ANDERSON DIVISION

CIVIL ACTION NO. 82-2059-14

Karole K. Jensen, as Administratrix of the Estate of Michael Clark, Deceased, Plaintiff,	)	
vs.	)	ORDER
Virgil L. Conrad, in his individual and official capacity as Commissioner of the Department of Social Services;	)	
Mary D. Dusenberry, George D. Hamilton, Oscar P. Butler, Ph.D., John C. Williams, Jr., Lucy C. Thrower, Agnes Wilson, Ph.D.,and W. Jerry Fedder, individually and in their official capacities as members of the State Board of the Department of Social Services;	)	
Jerry Herd, Harold E. Simpson, Ophelia W. Smith, J. Furman Gerrard, and Odell Short, individually and in their official capacities as members of the Anderson County Board of the Department of Social Services;	)	
Kenneth Pryor, individually and in his official capacity as Director	)	

of the Anderson County Department of Social Services;

Dawn Hawkins, individually and in her official capacity as Program Director for Human Services of the Anderson County Department of Social Services;

Susan Straup individually and in her official capacity as Protective Services Supervisor of the Anderson County Department of Social Services;

Defendants.

This matter is before the Court on motions to dismiss filed pursuant to Fed.R.Civ.P. 12(b)(6) by members of the Boards of the State Department of Social Services and Anderson County Department of Social Services. On January 24, 1983, a hearing was held on these motions. Shortly thereafter, affidavits were filed by movants reaching the merits of Plaintiff's claim. Consequently, the Court notified the parties that the pending motions to dismiss would be

viewed as motions for summary judgment under Fed.R.Civ.P. 56(b) and provided Plaintiff an opportunity to file responsive affidavits. Having now fully considered the additional affidavits and legal briefs offered by both parties, the Court is of the opinion that summary judgment should be entered in favor of movants.

FACTS

This action arises out of the death by beating of Michael Clark, a three-year-old child, apparently by the live-in boyfriend of Michael's mother.[1]

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[1]See generally the report of the investigation into the death of Michael Clark entitled "Report of Investigations of Circumstances Surrounding the Deaths of Certain Children in South Carolina Directly Resulting from Physical Abuse and Neglect or Abandonment."

The Anderson County Department of Social Services became involved prior to Michael's death when it received a report on February 28, 1980 from the Principal of New Prospect Elementary School concerning the possible abuse of Michael's older brother. A protective service caseworker was subsequently sent to the school to investigate the matter. Based on the caseworker's interview with the child and his teacher, she apparently decided that the family should be officially contacted. However, after repeated attempts, she failed to locate the home. Consequently, after the expiration of 60 days, the case was classified as "unfounded" and officially closed. No further action was taken by the Anderson County Department of Social Services

prior to Michael's death on June 23, 1980.[2]

The essence of Plaintiff's resulting Complaint against movants seems to be that the Board of the State Department of Social Services failed to provide proper training for protective service caseworkers in violation of state law and that the Board of the Anderson County Department of Social Services hired caseworkers who were inadequately trained.[3] The claim that protective service caseworkers were

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[2]While Michael's brother was the subject of the report of child abuse, Plaintiff maintains that had this report been properly investigated, Michael's death would have been prevented.

[3]Plaintiff does raise several other allegations in her Complaint which are not specifically related to training.

inadequately trained arises primarily from the allegation that Michael's home was never located even though his correct address was readily available through several sources in the community, including the School District Headquarters and the County Food Stamp Office. Plaintiff specifically maintains that Michael's death was not prevented, as it could have been through proper protective service intervention, because caseworkers were not taught essential investigatory techniques necessary to

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However, these allegations are not sufficiently particularized under Smith v. Ambrogio, 456 F.Supp. 1130 (D.Conn. 1978), to justify the extensive litigation which would be involved in this action. As such, they must be dismissed as insubstantial claims.

locate the parents or guardians of children who are suspected to be victims of abuse. In support of this contention, Plaintiff has submitted the affidavits of three former certified protective service caseworkers stating that the necesssary skill and knowledge to locate transitory or evasive families is not taught in the current training curriculum.[4]

Plaintiff alleges further that this failure to properly train protective service caseworkers has resulted in "a

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[4]See affidavits of Betty Flowers, Paragraph 6; Nancy Sadler, Paragraph 5; Robin Campbell, Paragraph 6.

pattern of cases throughout the state"[5] in which the Department of Social Services has failed to properly and timely intervene to prevent child abuse. In an attempt to support this contention, Plaintiff has submitted a document entitled "Report of Investigations of Circumstances Surrounding the Deaths of Certain Children in South Carolina Directly Resulting from Physical Abuse and Neglect or Abandonment." This document is primarily a report of an investigation conducted by the South Carolina Attorney General's Office into the deaths of ten children due to abuse or neglect occurring in the state between February, 1978 and June, 1980. In each case, the protective actions

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[5]See Plaintiff's Memorandum of Detailed Allegations, Paragraph 13(d).

undertaken by various county social services officials were critically examined.

In support of its training program, movants have submitted the affidavits of Wayne Holder, an expert in protective services training; Ramona L. Foley, the State Project Administrator for Child Protective Services and Permanency Planning; and Shirley H. Fitz-Ritzon, the State Director of Child Protective Services. Mr. Holder is the Director of the Children's Division of the American Humane Association (AHA) which was hired by the state in 1977 to develop a comprehensive training program for protective service caseworkers. Mr. Holder states that a comprehensive training program was developed by the

AHA and put into operation in 1978.[6] Based on his personal experience in protective service training in every region of the nation, he states that as a result of this program South Carolina clearly provides greater training in this area than is currently being provided on the national average.[7] Moreover, in his words, the state is "perceived as a pioneer in the area of child protection staff development."[8] Finally, Mr. Holder also states that, in

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[6] See affidavit of Wayne Holder, Paragraphs 3 and 5.

[7] Id., Paragraphs 11 and 12.

[8] id., Paragraph 11.

his opinion, current training in South Carolina is adequate to provide protective service caseworkers with the necessary knowledge and skill to properly perform their jobs.[9]

Both Ms. Foley and Ms. Fitz-Ritzon appear to share Mr. Holder's opinion concerning the adequacy of current protective service training in the state. Each, as a result of their jobs with the State Department of Social Services, is familiar with the specific details of the training program. In describing the program, both state in their respective affidavits that it is a two-week broad-based training course covering topics including but not limited to "identifying good parenting characteristics; identifying proper

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[9] Id., Paragraph 13.

child development; identifying characteristics of abusive and neglectful families; necessary information gathering; initial family contact; location of the family; assessment of risk; basic interviewing skills; identifying abuse injuries as opposed to accidental injuries; basic fact gathering; and proper use of foster care systems." (Emphasis added.)[10] All protective service caseworkers are required to complete this course and must pass a knowledge exam on the information presented in order to receive certification.[11] Moreover,

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[10] See affidavit of Ramona Foley, Paragraph 12. Also see affidavit of Shirley Fitz-Ritzon, Paragraph 12.

[11] Id., Paragraph 13.

regulations prohibit caseworkers from investigating cases involving suspected child abuse prior to receiving certification. Lastly, the program also requires annual recertification of protective service caseworkers based on continuing educational requirements.[12]

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[12]Several features of the training program were apparently considered highly innovative when developed in 1977. For example, among other achievements, the South Carolina program was the first in the nation to: (1) constitute a comprehensive training program based on competency, (2) require passage of a knowledge exam by all protective service caseworkers prior to receiving and investigating referrals, and (3) establish educational requirements for recertification. See affidavit of Wayne Holder, Paragraphs 4 and 12.

LAW

When an individual, particularly a child, is placed under the care, custody or supervision of a state governmental agency charged with a duty under state law to provide for his welfare, the failure of his governmental custodians to undertake reasonable action to protect him from obvious dangers may constitute a cause of action under 42 U.S.C. Section 1983. Doe v. New York City Department of Social Services, 649 F.2d 134, 141 (2d Cir. 1981); see generally, Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980); Withers v. Levine, 615 F.2d 158 (4th Cir. 1980). Of

course, a Section 1983 claim may not be based simply on the allegation that governmental officials violated state law in failing to take appropriate protective measures. In order to state a claim under Section 1983, it is necessary to allege a violation of federal constitutional or statutory rights. Maine v. Thiboutot, 448 U.S. 1 (1980); Ogilbee v. Western District Guidance Center, Inc., 658 F.2d 257, 258 (4th Cir. 1981). In this case, the due process clause of the fourteenth amendment constitutes an appropriate federal basis for the claim. See Jones v. The Board of Governors of the University of North Carolina, 704 F.2d 713, 717 (4th Cir. 1983).

Under the due process clause, an individual legally entrusted to the care or protection of governmental officials

has a right not to suffer injury as a proximate result of the failure of those officials to render reasonable care or protection due to their "deliberate indifference" to his welfare. Doe v. New York City Department of Social Services, 649 F.2d at 141; Orpiano v. Johnson, 632 F.2d at 1101.[13] governmental officials may be held to have acted with deliberate indifference toward an individual under their care if it is established that they

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[13]Under the South Carolina Children's Code, S.C. Code Ann. Sections 20-7-640, et seq., it is clear that a child falls under the care of the local child protective agency at the time a report of abuse is received. In this regard, S.C. Code Ann. Section 20-7-650(c) states, in part: "Within twenty-four hours of the receipt of a report of suspected child abuse or neglect, the agency shall commence an appropriate and thorough investigation...."

intentionally caused him harm, knowingly allowed others to harm him, or acted with conscious indifference to his safety.[14]

In defining the concept of deliberate indifference, it is important to recognize that although it is closely associated with gross negligence, there is a significant distinction. See Doe v. New York City Department of Social Services, 649 F.2d at 143. In essence, gross negligence is the breach of reasonable standards of conduct posing obvious dangers to others while deliberate indifference involves a

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[14] In this case, there are no allegations that movants had specific knowledge of harm suffered by Michael Clark prior to his death. Instead, Plaintiff's Complaint appears limited to the allegation that movants were deliberately indifferent to the welfare of abused children generally.

knowing lack of regard or concern for the safety of others. In the context of governmental care or custody, deliberate indifference involves the intentional failure of governmental officials assigned to the protection of an individual to concern themselves with that individual's welfare. Orpiano v. Johnson, 632 F.2d at 1101. A Governmental official may act with gross negligence toward an individual placed in his care by inadvertently exposing him to obvious and extreme dangers. However, unless that official was actually aware of the dangers involved and failed to act to provide reasonable protection due to a conscious lack of concern for the individual's safety, the

official did not act with deliberate indifference.[15]

Deliberate indifference and gross negligence are closely associated because conduct constituting gross negligence creates a rebuttable presumption of deliberate indifference. Doe v. New York City Department of Social Services, 649 F.2d at 143. This presumption arises from the fact that

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[15] In this regard, the Court stated in Orpiano v. Johnson, 632 F.2d at 1101, "There is no question about the legal principle that where prison supervisors with knowledge of a pervasive and unreasonable risk of harm to the prisoners, fail to take reasonable remedial steps to prevent such harm, their conduct may be properly characterized as deliberate indifference ...." (Emphasis added.) Also, in Doe v. New York City Department of Social Services, 649 F.2d at 143, the court stated: "[T]here can be instances where glaring negligence may not constitute deliberate indifference..."

although gross negligence does not involve any particular mental state or actual state of conscious awareness, it does involve a breach of duty exposing others to obvious danger. Of course, a party is generally presumed to have intended the obvious consequences of his acts. Therefore, when a governmental custodian, through acts constituting gross negligence, exposes someone in his care to danger, it may be presumed he did so intentionally or deliberately.

Deliberate indifference may also be inferred from the failure of a governmental official to perform specific duties required under statute. Id. at 146. This inference arises from the fact that duties of governmental officials are generally defined at least in part by state or federal law. Consequently, it is natural to presume

that governmental officials will familiarize themselves at least with those statutes which have a direct bearing on their official conduct. However, it is very important to distinguish between those laws which simply create general, vaguely defined duties and those which mandate specific conduct under particularized circumstances. As stated by the Court in Doe v. New York City Department of Social Services, 649 F.2d at 146:

> The more a statute or regulation clearly mandates a specific course of conduct, the more it furnishes a plausible basis for inferring deliberate indifference from a failure to act, even without any specific knowledge of harm or risk. This is because failure to undertake a specific course of action in vindication of a general duty can reasonably be attributed to a bona fide difference of opinion as to how the duty should be performed. However, no such alternative explanation for nonfeasance can be raised where the task mandated is specific and unequivocal.

Based on the affidavits submitted, clearly it cannot be established that movants, through the training of protective service caseworkers, acted with deliberate indifference to the welfare of children receiving protective care. In order to prove deliberate indifference, Plaintiff must establish that movants were aware of serious inadequacies in the training program which posed known risks to protective service recipients but declined to take available action to remedy these inadequacies.[16] Of course, as previously stated, knowledge of inadequacies in the

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[16] In Doe v. New York City Department of Social Services, 649 F.2d at 145, the Court stated:

> Of course, such [deliberate] indifference cannot exist absent

training process and the resulting risks to recipients could be inferred only if movants acted with gross negligence in establishing the training program or violated specific statutory duties. The affidavits conclusively establish that neither actual knowledge, gross negligence nor the violation of specific statutory duties may be proven in this case.

Considering first the relevant statutory duties involved, S. C. Code

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> some knowledge triggering an affirmative duty to act . . .but actual knowledge of a specific harm is not the only type of knowledge that will suffice. Defendants may be held liable under Section 1983 if they, or in the case of an agency, its top supervisory personnel exhibited deliberate indifference to a known injury, a known risk, or a specific duty.... (Emphasis added.)

Ann. Section 20-7-660(A) states in part: "The Department of Social Services and local agencies shall also, on a continuing basis, conduct training programs for local agency staffs...." (Emphasis added.) Neither this statute nor any other code section goes any further than to merely require that a training program be established. There is no attempt to define the types of training required or to specifically require training in any particular areas. Apparently, the legislature determined that the details of any such training program should be left to the discretion of the Department of Social Services. Consequently, this code section places only a general duty on the Department of Social Services to provide training. Moreover, because the statute does not mandate any specific

course of training, an alleged violation of the statute based on a failure to provide sufficient training in a highly specific area, as in this case, simply does not furnish a plausible basis for raising an inference of deliberate indifference.[17]

Further, the concept that deliberate indifference may not be inferred from the failure to undertake a specific course of conduct in furtherance of a general statutory duty is particularly justified under the facts of this case. Unquestionably, there are virtually unlimited areas in which it would be entirely appropriate

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[17]The result might, of course, be quite different had no training at all been provided.

and beneficial for protective service caseworkers to receive training. The Department of Social Services is ultimately given the responsibility under the law to establish educational priorities by determining which of those areas of training are most acutely needed and may be most effectively provided under the financial restraints faced by the agency. There is much room for reasonable debate and disagreement concerning how priorities should be set. However, when the decision is made and some areas of training are given greater attention at the expense of others, unless there is substantial evidence to the contrary, it should be presumed that the priorities were established in good faith. The fact that some may conclude that insufficient training is provided in a particular

area must be attributed to a difference of opinion as to how the duty to train should be accomplished rather than deliberate indifference on the part of those charged with the duty to make the necessary decisions.

Also, the affidavits establish that movants had neither actual knowledge of serious inadequacies in the training program nor acted with gross negligence from which actual knowledge could be inferred. Movants deny that the training program is inadequate. In support of movants' position that the training program was not inadequate, affidavits were submitted by Wayne Holder, an expert in the field of caseworker training, and by two high-ranking officials in the State Department of Social Services. None of the three affidavits acknowledges the existence of serious inadequacies in the

program. In fact, Mr. Holder stated explicitly that the training program provides protective service caseworkers with the knowledge and skill to properly perform their jobs. In response, Plaintiff has submitted the affidavits of three former certified protective service caseworkers who, having attended the training program, maintain that it is inadequate to provide necessary skill and knowledge to locate transitory or evasive families. However, there is no indication that these caseworkers communicated their concerns about the inadequacy of the training to movants prior to Michael Clark's death. Consequently, there is no evidence in the record indicating movants had knowledge of inadequate training. Therefore, in order to establish deliberate indifference, it must be shown that movants acted with gross

negligence in failing to provide more effective training. In order to prove gross negligence based on an alleged failure to provide proper training, it is necessary to show that a resulting pattern of injuries occurred which should have placed movants on notice of inadequacies in the training program. Withers v. Levine,[18] 615 F.2d at 161; Orpiano v. Johnson 632 F.2d at 1101.

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[18] In Withers, the Court stated: A pervasive risk of harm may not ordinarily be shown by pointing to a single incident or isolated incidents, but it may be established by much less than proof of a reign of violence and terror in the particular institution.... It is enough that violence and sexual assaults occur... with sufficient frequence... to reasonably apprise prison officials of the existence of the problem and the need for protective measures. (Emphasis added.)

Absent a prior pattern of injuries, gross negligence may be established only by showing that the alleged inadequacies in training were so extreme that Plaintiff's injury was an "almost inevitable" consequence. Leite v. City of Providence,[19] 463 F.Supp. 585, 590 (D.R.I. 1978); Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir. 1979).

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[19] In Leite the Court stated: Although a city cannot be held liable for simple negligent training of its police force, the city's citizens do not have to endure a "pattern" of past police misconduct before they can sue the city under Section 1983. If a municipality completely fails to train its police force, or trains its officers in a reckless or grossly negligent manner so that future police misconduct is almost inevitable, the municipality exhibits a "deliberate indifference" to the resulting violations of a citizen's constitutional rights. (Emphasis added.)

In an apparent attempt to establish a prior pattern of injuries, Plaintiff submitted a document prepared by the South Carolina Attorney General's Office entitled "Report of Investigations of Circumstances Surrounding the Deaths of Certain Children in South Carolina Directly Resulting from Physical Abuse and Neglect or Abandonment." As stated previously, this document is a report of an investigation into the deaths of ten children in the state in which the actions taken by local Department of Social Services officials were criticized. However, under close examination, this report is insufficient to establish a prior pattern of injuries.

The report involves an investigation into the actions undertaken by local Department of Social

Services agencies in five cases[20] arising throughout the state over nearly a three-year period. Signficantly, each case arose in a different county involving different local Department of Social Services officials. There was no indication of repeated malfeasance or nonfeasance on the part of a particular local agency. Most importantly, however, these cases do not involve repeated errors of the same nature.

The report into the Michael Clark case indicates that his death was not prevented because of the failure of a protective service caseworker to locate his home address after a report was received of child abuse concerning his

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[20] In one case, six of the ten children who were the subject of this report died in a fire in their home while their mother was apparently away.

brother. Also, it appears this failure may have resulted from a lack of familiarity with available sources in the county from which a current address could have been obtained. Yet of the five cases examined, the Michael Clark case was the only one in which an inability to properly locate transient families was identified even indirectly as a potential problem. Consequently, prior to Michael Clark's death, none of these cases constituted a pattern of injury from which movants should have been placed on notice of this potential inadequacy in the training program. Instead, this case represents a tragic but nonetheless isolated incident, insufficient to support a finding of gross negligence.

Moreover, it cannot be reasonably argued that the training program

provided was so grossly inadequate that the death of protective service recipients should have been anticipated as an almost inevitable consequence. As stated in the affidavit of Wayne Holder, South Carolina provides greater training than is currently provided by a majority of states.[21] Also, the current training program was originally developed by the AHA under contract with the State Department of Social Services. The AHA is currently the oldest and one of the most widely recognized national organizations involved in the development of programs and services on behalf of neglected and abused

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[21]See affidavit of Wayne Holder, Paragraphs 11-12.

children.[22] There is nothing before the Court from which it could conclude that movants should have foreseen that the AHA would develop a training program so grossly inadequate as to almost inevitably result in preventable death. Consequently, summary judgment is granted in movants' favor.[23]

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[22] Id. at Paragraph 12.

[23] To the extent that Plaintiff's Complaint alleges a claim against the Boards of the State and Anderson County Departments of Social Services as opposed to the members of those Boards in their individual capacities, these claims also must be dismissed as barred by the eleventh amendment. The State Department of Social Services functions as the alter ego of the state, making it immune from suit in federal court. See Jensen v. Conrad, C.A. 82-2061-15 (D.S.C. March 7, 1983); Alabama v. Pugh 438 U.S. 781 (1978). Moreover, based on the affidavit of John Crosscope, the Interim Commissioner of the State Department of Social

IMMUNITY

The caseworker or caseworkers who had personal involvement in the Michael Clark investigation do not stand on the same legal footing as movants. This is not to suggest that the Court has anopinion concerning the merits of any claim asserted against a caseworker. However, under the circumstances involved in this claim, solely from a legal perspective, the charge that movants are liable for deliberate indifference in training caseworkers must be treated differently from the

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Services, it is clear that the Anderson County Department of Social Services is merely an arm of the State Department of Social Services, also immune from suit.

charge that caseworkers acted with deliberate indifference in the investigation of Michael's case.

The basis for this distinction is found primarily in the fact that state statutory law concerning the investigation of suspected child abuse cases is much more specific than the law dealing with the training of caseworkers. As stated previously, the state law concerning training merely creates a general, vaguely defined duty to "conduct training programs" without specifying the areas or types of training required. On the other hand, the obligations of protective service caseworkers involved in the investigation of suspected abuse cases are specifically defined in S. C. Code Ann. Section 20-7-650 which states, in part:

> (C) Within twenty-four hours of the receipt of a report of suspected child abuse or neglect, the agency shall commence an appropriate and thorough investigation to determine whether a report of suspected child abuse or neglect is "indicated" or "unfounded". The finding shall be made no later than sixty days from the receipt of the report. In conducting the investigation if the facts so warrant the agency investigator may petition the Family Court of the appropriate judicial circuit for a warrant to inspect the premises and condition of the child subject of the report. The Family Court shall issue the inspection warrant upon probable cause to believe the child is abused or neglected, as defined by this article. (Emphasis added.)

Although every feature of an appropriate abuse investigation is not expressly enumerated in Section 20-7-650, taken as a whole, the statute places very specific duties on the caseworker assigned to an investigation. Not only does the statute create strict guidelines under which an investigation must be commenced

and completed, it is also fairly specific with respect to the type of investigation which should be conducted. Particularly, an investigation is to be conducted to determine whether there is reasonable cause to suspect that a child has been abused by members of his household. To better enable the caseworker to perform his duty, a warrant may be obtained from the Family Court authorizing physical examination of a child and inspection of the home. On a finding of reasonable cause to believe a child has been physically, mentally, or sexually abused, protective services must be initiated and the Family Court notified within one week. S. C. Code Ann. Section 20-7-650(H). If services are declined, the Family Court may be petitioned to forcibly intervene. Id. at (J). Consequently, because this

statute mandates a specific course of conduct to be performed under particularized circumstances, violations of the statute by protective service caseworkers engaged in an abuse investigation may raise an inference of deliberate indifference. Doe v. New York City Department of Social Services, 649 F.2d at 146.

Moreover, the specificity of the statute dealing with abuse investigations forms the basis for another important distinction between the legal positions of movants and caseworkers. In the recent case of Harlow v. Fitzgerald, ___ U.S. ___, 102 S.Ct. 2727, 2738-39 (1982), the United States Suupreme Court held that public officials sued in their individual capacities for damages under Section 1983 are entitled to good faith immunity from suit unless their alleged actions

violated law which was "clearly established" at the time. Prior to Harlow, in order to establish immunity, a public official was required to prove he acted in both objective and subjective good faith. See Wood v. Strickland, 420 U.S. 308 (1975). Objective good faith required a showing that the official neither knew nor reasonably should have known his actions violated federal rights. On the other hand, subjective good faith required a showing that, regardless of what the official should have known, he did not act with malicious intent toward plaintiff or indifference toward his rights.

In Harlow, the Supreme Court rejected the subjective element requirement finding that only an objective requirement need be satisfied in order to establish good faith

immunty. Further, the Court indicated that the objective element should be analyzed in terms of whether the right allegedly violated was a clearly established right at the time of the alleged violation. In other words, an official may be heid to actual or constructive knowledge only of those rights which were clearly established at the time. The basis cf this ruling seemed to be the Court's concern that the subjective element of good faith immunity served to unnecessarily block entry of summary judgment in favor of public officials even with respect to those cases constituting insubstantial claims.[24]

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[24]The Court stated:

The subjective element has

Further, the court adopted the "clearly established law" test primarily to shield public officials from unfair liability. Public officials should not be expected to forecast future developments in the law. The fear of changing legal interpretations and the establishment of rights not previously recognized should not be allowed to rob

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> frequently proved incompatible with our admonition in Butz [Butz v. Economou, 438 U.S. 478 (1978)] that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. (Footnote omitted.) And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

102 S.Ct. at 2737-38.

officials of flexibility in performing their duties. Harlow v. Fitzgerald, 102 S.Ct. at 2739. Consequently, in order to avoid punishing officials for subsequent developments in the law, protect flexibility and limit insubstantial lawsuits, public officials are liable only for violations of clearly established law of which they should have had notice.

Applying this test to the present case, it appears that the Board members of the State and Anderson County Department of Social Services are immune from suit. At the time of Michael Clark's death, the meaning of Section 20-7-660(A) requiring movants to "conduct training programs," having not been specifically defined, was not clearly established. Nor was there clearly established case law defining a

general due process training requirement in this area.[25] Therefore, movants are entitled to good faith immunity since the training program they provided was not in violation of clearly established law constituting reasonable notice of possible liability.

The same argument, however, cannot be made in favor of the caseworkers. The obligations of protective service caseworkers are specifically defined in Section 20-7-650. the requirements which must be satisfied are clearly established, thereby providing proper notice. Therefore, caseworkers who act in violation of these requirements

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[25] Doe v. New York City Department of Social Services, the first directly analogous case in this field, was decided approximately one year after Michael's death.

cannot be reasonably held to have acted in "good faith". None of the purposes behind the Harlow objective good faith immunity rule would be served by such a decision. When a governmental official acts in violation of a specific statute which has a direct bearing on his official conduct and of which it is reasonable to expect him to be knowledgeable, a resulting lawsuit cannot be reasonably characterized as "insubstantial." Nor will holding that official liable in such a case constitute unfair punishment or place undesirable restraints on his flexibility.[26]

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[26]This is not to suggest that a violation of a state statute alone may constitute a cause of action under

Therefore, in conclusion, summary judgment is entered in favor of the members of the Boards of the State Department of Social Services and the

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Section 1983. In order to establish a claim under Section 1983, it is necessary to prove a violation of constitutional or federal statutory rights. Maine v. Thiboutot, 448 U.S. at 1. However, where a specific state statute is violated, good faith immunity will not serve as a defense to a subsequent section 1983 claim.

This Court recognizes that some may argue that good faith immunity may be established under Harlow even in the face of blatant violations of state law unless there is a corresponding "clearly established" federal statutory or constitutional right. This argument, however, is rejected by this Court on the basis that the purposes behind the Harlow decision would not be served in such a case. Further, the plain wording of Harlow does not support such an interpretation. In Harlow the Court stated:

Anderson County Department of Social Services based on the affidavits submitted by the parties and the objective good faith immunity rule created in Harlow. This same reasoning, however, does not create a basis for

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> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. (Emphasis added.)

102 S.Ct. at 2738.

....

> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate....(Emphasis added.)

Id. at 2739.

entry of summary judgment in favor of caseworkers personally involved in the Michael Clark investigation. Presently, it is not possible to determine from Plaintiff's Complaint which caseworkers were actually involved in the investigation of this case. Consequently, Plaintiff is given 15 days from the receipt of this Order to file a more detailed complaint against Kenneth Pryor, Dawn Hawkins, and Susan Straup, particularizing their individual involvement in the Michael Clark investigation.[27]

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[27]All three of these defendants have a motion for summary judgment presently pending based primarily on the same grounds as the Board members. After receipt of more detailed allegations from Plaintiff, these defendants may, of course, renew their motions for summary judgment on other grounds.

Finally, the parties may now proceed with discovery, which was temporarily stayed pending the issuance of this Order.

AND IT IS SO ORDERED.[28]

s/William W. Wilkins, Jr.
United States District Judge

Greenville, S. C.
June 16, 1983.

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[28]Plaintiff's Supplemental Memorandum dated May 17, 1983, was not considered by the Court in this Order granting summary judgment because it was not timely filed. However, it does not appear that this Memorandum would have affected the Court's decision.

84-1150

Office-Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Karole K. Jensen, as
Administratrix of the
Estates of Sylvia Brown
and Michael Clark, Deceased,

Petitioner,

v.

Virgil L. Conrad, et al,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

APPENDIX
VOLUME II

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

ANDERSON DIVISION

CIVIL ACTION NO 82-2059-14

Karole K. Jensen, as Administratrix of the Estate of Michael Clark, Deceased, Plaintiff, vs. Virgil L. Conrad, in his individual and official capacity as Commissioner of the Department of Social Services; Kenneth Pryor, individually and in his official capacity as Director of the Anderson County Department of Social Services; Dawn Hawkins, individually and in her official capacity as Program Director for Human Services of the Anderson County Department of Social Services; Susan Straup and Charie Ann	ORDER

Jenkins, individually and in their official capacities as social workers with the Anderson County Department of Social Services;

Defendants.

This matter is before the Court on motion by Defendant Virgil L. Conrad seeking summary judgment pursuant to Fed.R.Civ.P. 56(b). Based on this Court's reasoning in its Orders of June 16, 1983 and August 24, 1983, and the affidavit submitted by Defendant, this motion is granted.

AND IT IS SO ORDERED.

William W. Wilkins, Jr.
United States District Judge

Greenville, SC.

August, 24, 1983.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CARCLINA

ANDERSON DIVISION

CIVIL ACTION NO. 82-2059-14

Karole K. Jensen, as Administratrix of the Estate of Michael Clark, Deceased, Plaintiff, vs. Virgil L. Conrad, in his individual and official capacity as Commissioner of the Department of Social Services; Kenneth Pryor, individually and in his official capacity as Director of the Anderson County Department of Social Services; Dawn Hawkins, individually and in her official capacity as Program Director for Human Services of the Anderson County Department of Social Services; Susan Straup and Charie Ann	ORDER

Jenkins, individually and in their official capacities as social workers with the Anderson County Department of Social Services;

Defendants.

Finding that there is no just reason for delay, the Clerk is directed, pursuant to Fed.R.Civ.P. 54(b), to enter final judgment in favor of Virgil L. Conrad and the members of the Boards of the State and Anderson County Department of Social Services.

AND IT IS SO ORDERED.

William W. Wilkins, Jr.
United States District Judge

Greenville, SC.

August, 24, 1983.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

ANDERSON DIVISION

CIVIL ACTION NO. 82-2059-14

Karole K. Jensen, as Administratrix of the Estate of Michael Clark, Deceased, Plaintiff, vs. Virgil L. Conrad, in his individual and official capacity as Commissioner of the Department of Social Services; Kenneth Pryor, individually and in his official capacity as Director of the Anderson County Department of Social Services; Dawn Hawkins, individually and in her official capacity as Program Director for Human Services of the Anderson County Department of Social Services; Susan Straup and Charie Ann	ORDER

Jenkins, individually and in their official capacities as social workers with the Anderson County Department of Social Services;

Defendants.

MOTION FOR

RECONSIDERATION

This matter is before the Court on Plaintiff's motion for leave to file an Amended Complaint pursuant to Fed.R.Civ.P. 15(a). Also, pursuant to Fed.R.Civ.P. 59(e), Plaintiff seeks to alter or amend this Court's Order of June 16, 1983, granting summary judgment in favor of all members of the Boards of the State and Anderson County Departments of Social Services. Finding no merit to either motion, both are denied.

Plaintiff's initial Complaint was filed on August 16, 1982. Shortly thereafter, various defendants sought dismissal pursuant to Fed.R.Civ.P. 12(b)(6) alleging Plaintiff had failed to state a cause of action. At the conclusion of a hearing held by this Court to consider these motions, Plaintiff was instructed to file more detailed allegations. Upon receipt of these allegations, the parties were notified that the Court would construe Defendants' pending motions to dismiss as motions for summary judgment. Both sides were then provided a full opportunity to file supporting affidavits and supplemental briefs. This Court subsequently granted summary judgment based on the affidavits submitted.

In essence, Plaintiff now seeks to

escape summary judgment by filing new pleadings.[1] Also, Plaintiff offers additional affidavits and exhibits not previously filed in response to the motion for summary judgment which are now alleged to raise a genuine issue of fact. However, it is clear that summary judgment cannot be circumvented in such a manner.

Once summary judgment is granted against a party, the case cannot be reopened by filing new pleadings unless the judgment is first set aside or vacated. 6 Wright & Miller, Federal Practice and Procedure: Civil Section 1489; See also, Sachs v. Snider, 631

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[1]Given the fact that this Court previously ordered Plaintiff to file additional pleadings, this would constitute Plaintiff's third Amended Complaint in this case.

F.2d 350 (4th Cir. 1980); Chrysler Corp. v. Commercial Lakeshore Finance Corp., 66 F.R.D. 607 (E.D.Wis. 1975). Moreover, summary judgment will generally not be altered or vacated on the basis of supplemental exhibits or affidavits filed after summary judgment is granted. See DeLong Corp. v. Raymond International, Inc., 622 F.2d 1135 (3rd Cir. 1980); Clarke v. Montgomery Ward & Co., 298 F.2d 346 (4th Cir. 1962). This is particularly true in a case such as this where the party seeking to amend judgment has made absolutely no showing that the additional evidence offered could not have been timely submitted in the exercise of reasonable diligence.[2]

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[2]Plaintiff was given ample opportunity to submit responsive briefs, exhibits and affidavits before summary judgment was granted. Had more time been necessary, Plaintiff was certainly free to petition the Court for an extension. No such motion was made.

Consequently, Plaintiff is denied leave to file an Amended Complaint and this Court's prior Order granting summary judgment is reaffirmed.[3]

In reaffirming this Order, further discussion is warranted in two areas. (1) Defendants' motion for summary judgment raised difficult issues concerning good faith immunity from suit under Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982), which were resolved by this Court after exhaustive consideration. This Court has since discovered additional authority to support its conclusions on these issues. (2) Recently, on reconsideration, Judge Clyde H. Hamilton of this District,

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[3]To the extent that Plaintiff's motion to alter or amend the judgment can be construed to be based on allegations of error, this Court finds no merit in Plaintiff's claim.

dismissed a claim based on facts very similar to the facts involved in this case due to a lack of state action. See Jensen v. Conrad, C.A. 82-2061-15 (D.S.C. Supp. Order July 18, 1983). Consequently, it is now incumbent on this Court to elaborate on its reasoning for not dismissing this case on the same basis.

IMMUNITY

Summary judgment was granted in favor of all members of the Boards of the State and Anderson County Departments of Social Services based in part on the Harlow good faith immunity rule.[4] In Harlow, the United States

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[4]The court also granted summary judgment based on the merits of the case prior to considering Defendants' immunity claim.

Supreme Court held that public officials sued in their individual capacity for damages under 42 U.S.C. Section 1983 are entitled to good faith immunity from suit unless their actions violated "clearly established" law. This Court found that the alleged failure of Department of Social Services Board members to provide protective service caseworkers with effective training in a specific area of expertise did not allege a violation of clearly established federal or state law. However, the claim that caseworkers personally assigned to a child abuse case failed to complete a proper investigation was found to allege a violation of clearly established state law. Moreover, this Court held that a stat official who acts in violation of clearly established state law which nas a direct bearing on his official

conduct, may not assert good faith immunity as a defense to a subsequent Section 1983 action.[5]

The question of whether a state official who acts in violation of

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[5]This Court did, of course, recognize that a mere violation of state law would not constitute a cause of action under Section 1983. To establish a claim under Section 1983, it is necessary to prove a violation of constitutional or federal statutory rights. In this regard, the Court found the claim that protective service caseworkers had acted with deliberate indifference in failing to protect a child from obvious and preventable dangers alleged a violation of the due process clause of the fourteenth amendment. See Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981). Moreover, the fact that a constitutional right to such protection was not clearly established at the time of the child's injuries was held not to constitute a defense to the claim since the caseworkers were allegedly acting in violation of clearly established state law.

clearly established state law may be entitled to the protection of good faith immunity was specifically addressed in Williams v. Treen, 671 F.2d 892 (5th Cir. 1982).[6] After thorough analysis of the policy objectives which prompted recognition of the good faith immunity defense, the Fifth Circuit ruled that state officials who violate clearly established state law are not entitled to this protection. Specifically, that court stated:

> We believe that prison "...officials are charged with knowledge of their own prison regulations." Chavis v. Rowe, 643 F.2d 1281, 1289 (7th Cir. 1981) and

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[6]The Court stated: "We are therefore confronted with what appears to be a question of first impression in this Circuit. We must determine whether 1983 defendants are entitled to the protection of a qualified immunity when there has been a violation of clearly established state law." Williams v. Treen, 671 F.2d at 899.

that they "may not take solace in ostrichism." Id. If an official's conduct contravenes his own state's explicit and clearly established regulations, a subjective belief in the lawfulness of his action is per se unreasonable.... To hold otherwise would be to encourage official ignorance of the law.

We of course recognize that a Section 1983 plaintiff must allege a deprivation of a federally protected right in order to set forth a prima facie case, Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed. 2d 555 (1980); violation of a state law alone does not give rise to a cause of action under Section 1983. Bills v. Henderson, 631 F.2d 1287 (6th Cir. 1980). We believe that our conclusion regarding the immunity defense in this case is entirely consistent with this well established principle. The Section 1983 cause of action in this case is based upon the fact that the federal constitutional rights of these inmates were violated.... At this juncture, the only question before the court is whether the defendant officials are entitled to the special protections of a qualified immunity. We hold that when a state official violates the constitutional rights of a citizen, and in so doing also violates clearly established state law which enforces those rights, the

EDITOR'S NOTE

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> defendant official is not entitled to an immunity which is based upon reasonable good faith.

Williams vs. Treen, 671 F.2d at 899-900.

STATE ACTION

In examining the issue of whether state action exists in this case, it is important to carefully consider the alleged basis for liability. On June 23, 1980, Michael Clark, a three-year-old child, was apparently beaten to death by the live-in boyfriend of Michael's mother. Four months previously, the Anderson County Department of Social Services had received a report of child abuse in Michael's family. However, the

protective service caseworkers assigned to investigate that incident allegedly failed to conduct a proper abuse investigation in violation of specific requirements of state law. Failing to make contacat with Michael's family, the Complaint alleges that the protective service caseworkers simply classified the report as "unfounded" and the case was officially closed. Consequently, due to alleged deliberate indifference on the part of state officials, Michael was abandoned to a clearly abusive home life, making subsequent injury virtually inevitable.[7]

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[7]Because of the current posture of this case, the Court is required to view the facts in a light most favorable to Plaintiff. Of course, this should not be construed to indicate that the Court has reached any conclusions concerning the merits of the claim against the caseworkers.

Under these circumstances, because Michael was killed by a private party not under state supervision or control, it might be argued that there was no state action which significantly contributed to his death. Certainly state officials did not affirmatively act to harm him. However, such an argument ignores the fact that had the protective service caseworkers properly performed their duties in accordance with state law, Michael's death could possibly have been prevented. In other words, state officials may have been responsible for Michael's death due to their conscious inaction rather than because of any affirmative conduct.

It is an established principle of law under Section 1983 that state officials may be held liable for damages

resulting from their failure to perform official duties. In this regard, police officials are liable for purposeful failure to protect individuals who, through the exercise of constitutional rights, are endangered by resulting mob violence. See Downie v. Powers, 193 F.2d 760, 764-65 (10th Cir. 1951).[8]

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[8] In Downie the Court Stated:

> One charged with the duty of keeping the peace [under state law] cannot be an innocent bystander where the constitutionally protected rights of persons are being invaded. He must stand on the side of law and order or be counted among the mob.... But the officials are the keepers, not the insurers of the peace in the community. Diligent and conscientious effort is all that is required....
>
> When all the evidence bearing upon the action or inaction of the city officials is considered in its totality we think it presented a factual issue.... (Emphasis added.)

Downie v. Powers, 193 F.2d at 764.

Furthermore, state officials must enforce the law in a non-discriminatory manner. For example, they may be held liable under Section 1983 for purposeful failure to protect unpopular minorities. See Smith v. Ross 482 F.2d 33 (6th Cir. 1973); Catlette v. United States, 132 F.2d 902 (4th Cir. 1943).[9] Therefore, the conscious failure of state officials to perform statutorily imposed duties without justification in itself constitutes state action.

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[9] In this regard, the Court stated:

> We agree with appellants that a law enforcement officer can be liable under Section 1983 when by his inaction he fails to perform a statutorily imposed duty to enforce the laws equally and fairly, and thereby denies equal protection to persons legitimately exercising rights guaranteed them under state or federal law. Acts of omission are actionable in this context to the same extent as are acts of commission. (Emphasis added.)

It is clear, however, that the mere fact that some state action was involved in Michael's death does not entirely resolve the state action issue. In order for an injury to be actionable under Section 1983, there must have been sufficient state action so that state officials may be fairly held responsible. Defendants have argued, based on Martinez v. California, 444 U.S. 277 (1980), that Plaintiff has

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Smith v. Ross, 482 F.2d at 36-37.

In Catlette, The Court stated: "It is true that a denial of equal protection has hitherto been largely confined to affirmative acts of discrimination. The Supreme Court, however, has already taken the position that culpable official State inaction may also constitute a denial of equal protection." Catlette v. United States, 132 F.2d at 907.

failed to allege sufficient state action to maintain a claim under Section 1983.

In Martinez, a Section 1983 action was brought against members of the California Parole Board on behalf of a 15-year-old girl who was murdered by a parolee five months after he was released from prison. This claim was based on the allegation that the Board's action in granting parole, despite the parolee's history as a sex offender, had caused the loss of the girl's life without due process of law. In dismissing this case for a lack of state action, the Supreme Court stated: "[D]ecedent's death is too remote a consequence of the parole officers' action to hold them responsible under federal civil rights law." Martinez v. California, 444 U.S. at 285. However, this conclusion appeared to be based

primarily on the finding that "the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger."[10] Id.

Of course, the facts of the present case are readily distinguishable from the facts in Martinez. Unlike the parole officers in Martinez, the protective service caseworkers in this case were allegedly aware that particular individuals (i.e., the children in the Clark family), "as distinguished from the public at large," faced special danger (i.e., physical abuse by their

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[10]The Court also considered the fact that the parolee was not an agent of the Parole Board and the murder had occurred five months after his release. Martinez v. California, 444 U.S. at 285.

guardians).[11] Moreover, the caseworkers were hired specifically to protect children such as Michael from this particular "special danger." As public officials, they were required to perform specific statutory procedures designed to prevent child abuse. SeeS. C. Code Ann. Section 20-7-650(C). Allegedly, these procedures were not followed and a proper investigation was never completed. Under these circumstances, it would simply be unreasonable to characterize Michael's death as "too remote a consequence" of the caseworkers' alleged failure to perform their official duties. Viewing the

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[11]This distinction was recognized by Judge Phillips in a recent Fourth Circuit opinion. Fox v. Custis, No. 82-1144, slip op. at 10 (4th Cir. July 13, 1983).

facts in a light most favorable to Plaintiff, Michael's death was a direct and highly predictable consequence of official inaction for which the caseworkers may be fairly held accountable under Section 1983.[12]

It is, of course, clear that a claim may not be asserted under Section 1983 on the basis of state action alone. To establish a claim under

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[12]It is also important to recognize that another significant distinction can be made between the facts in Martinez and the facts in this case. In Martinez, the Parole Board was performing a discretionary risk-assessing function. A strong argument can be made that in order to provide the members of the Parole Board with the necessary flexibility of judgment to properly perform such a function, they must be given significant protection from suit. However, in the present case it is alleged that the caseworkers failed to perform mandatory functions. In performing mandatory functions,

Section 1983, it is also necessary to prove a violation of federal constitutional or statutory rights. Defendants argue that, even in the presence of state action, Plaintiff's claim must be dismissed due to a failure to allege a violation of federal rights.

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flexibility of judgment is not generally required and, therefore, immunity from suit is not justified.

The mandatory abuse investigation required under South Carolina law is designed to collect information concerning suspected abuse cases. This information may subsequently be utilized by the Department of Social Services in performing discretionary functions, such as deciding whether to attempt to terminate parental rights. When making this sort of determination, a strong argument could be made that the Department of Social Services also needs protection from lawsuits in order to function properly.

In this regard, Defendants cite Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982), which held generally there is no right to state protection against criminal conduct. Consequently, since there is no "constitutional duty [on the state] to provide such protection its failure to do so is not actionable under Section 1983." Bowers v. DeVito, 686 F.2d at 618. However, in recently accepting this principle in Fox v. Custis, No. 82-1144, slip op. at 9-11, the Fourth Circuit also recognized an important exception. Although the state has no constitutional duty to protect members of the general public from random criminal violence, a constitutional right to affirmative protection by the state may arise out of special relationships "created or assumed by the state in respect of

particular persons." Fox v. Custis, No. 82-1144, slip op. at 9.

Unfortunately, the Court in Fox did not specifically define the type of "special relationship" which may give rise to a right to protection vindicable under Section 1983.[13] However, it is difficult to imagine a relationship more special than that assumed by the state with respect to children reported to the Department of Social Services as

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[13] In this regard, the Court stated:

> Without attempting a general definition of the special relationship required to give rise to a right, vindicable under Section 1983, to affirmative protection by the state, it suffices to observe that none is claimed or appears here. The claimants here were simply members of the general public living in the free society, and having no special custodial or other relationship with the state. (Emphasis added.)

Fox v. Custis, No. 82-1144, slip op. at 10.

suspected victims of abuse. This is particularly clear in light of the exhaustive statutory procedures adopted by the state specifically mandating a rapid and detailed investigation of every report. Based on these statutory procedures, it is clear that this state has assumed a special protective relationhip with respect to such children.

It is important to realize, however, the mere failure of protective service caseworkers to follow these procedures and offer appropriate protection due to negligence or inadvertence, even in light of this special relationship, does not state a claim under Section 1983. To establish liability under Section 1983, Plaintiff must prove that Defendants acted with "deliberate indifference." See Doe v.

New York City Department of Social Services, 649 F.2d at 134. In essence, this requires a showing that Defendants, with actual knowledge that Michael faced a pervasive and unreasonable risk of harm, failed to provide reasonable protection due to a conscious lack of concern for his safety.[14] Conduct of this type, in violation of statutory law and a duty of protection clearly assumed

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[14]Although "deliberate indifference" may be presumed from violations of specific statutory law or acts of gross negligence, this is merely a permissible inference or presumption. As such, the inference is sufficient to avoid entry of summary judgment or directed verdict. However, it does not result in a shifting of the burden of proof or require any specific response from Defendants. In the final analysis, a jury would have to conclude that Defendants acted with actual knowledge and a conscious lack of concern in order to return a verdict in Plaintiff's favor.

by the state, is sufficiently offensive to traditional notions of fundamental fairness and substantial justice to violate the due process clause of the fourteenth amendment.

Consequently, this Court's prior Order of June 16, 1983 is reaffirmed.

AND IT IS SO ORDERED.

s/William W. Wilkins, Jr.
United States District Judge

Greenville, S. C.
August 24, 1983.

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s/William W. Wilkins, Jr.
United States District Judge

Greenville, S. C.
August 24, 1983.

ARTICLE 7

INTAKE

SUBARTICLE 1

GENERAL PROVISIONS

Section 20-7-480. Purpose.

Recognizing that abused and neglected children in South Carolina need protection, it is the purpose of this article to save them from injury and harm by establishing an effective reporting system and encouraging the reporting of children in need of protection; by establishing an effective system of services throughout the State to safeguard the well-being and development of endangered children and to preserve and stabilize family life, whenever appropriate; by establishing fair and equitable procedures, compatible with due process of law to

intervene in family life with due regard to the safety and welfare of all family members and by establishing an effective system of protection of children from injury and harm while living in public and private residential agencies and institutions meant to serve them.

HISTORY: 1981 Act No. 11, Section 1, eff May 19, 1981.

Section 20-7-490. Definitions.

When used in this article and unless the specific context indicates otherwise:

(A) "Child" means a person under the age of eighteen.

(B) "Abused or neglected child means a child whose physical or mental health or welfare is harmed or threatened with harm, as defined by items (C) and (D) of this section, by the acts or omissions of his

parent, guardian or other person responsible for his welfare.

(C) "Harm to a child's health or welfare can occur when the parent, guardian or other person responsible for his welfare:

(1) Inflicts or allows to be inflicted upon the child physical or mental injury, including injuries sustained as a result of excessive corporal punishment, but exlcuding corporal punishment or physical discipline which meets each of the following guidelines:

(a) The physical agression must be administered by a parent or person in loco parentis.

(b) It must be perpetrated for the sole purpose of restraining or correcting the child.

(c) The force or violence of the discipline must be reasonable in

manner and moderate in degree.

(d) The force and violence of the discipline must not have brought about permanent or lasting damage to the child.

(e) The behavior of the parent must not be reckless or grossly negligent.

(2) Commits or allows to be committed against the child a sexual offense as defined by the law of this State.

(3) Fails to supply the child with adequate food, clothing, shelter, education as required under Article 1 of Chapter 65 of Title 59, or health care though financially able to do so or offered financial or other reasonable means to do so. For the purpose of this chapter "adequate health care" includes any medical or nonmedical remedial health care permitted or authorized under state law.

(4) Abandons the child, as defined

by Section 20-7-1570.

(5) Encourages, condones or approves the commission of delinquent acts by the child and the commission of the acts are shown to be the result of the encouragement, condonation or approval.

(D) "Threatened harm" means a substantial risk of harm, as defined by item (C).

(E) "A person responsible for a child's welfare" includes the child's parent, guardian, foster parent, an employee of a public or private residential home, institution or agency, or other person legally responsible for the child's welfare in a residential setting.

(F) "Physical injury" means death, disfigurement or impairment of any bodily organ.

(G) "Mental injury" means a substantial impairment of the intellectual, psychological or emotional capacity of a child as evidenced by inhumane, or unconscionable

acts and conduct. Provided, nothing herein shall be construed as prohibiting a person responsible for a child's welfare from imposing reasonable restrictions deemed necessary by such person for the intellectual, psychological or emotional well-being of the child by any of the following means or methods:

(1) Restrictions relating to attendance at amusements, concerts, social events or activities, or theaters;

(2) restrictions on amount of exposure to secular activities such as television, extra-curricular school activities or community recreational activities;

(3) instructions, directions, or mandates relating to public or private elementary or secondary education or attendance at churches or other places of worship.

(H) "Institutional child abuse and neglect" means situations of known or suspected child abuse or neglect where the person

responsible for the child's welfare is the employee of a public or private residential home, institution or agency.

(I) "Protective Services Unit" means the unit established within the Department of Social Services which shall have prime responsibility for state efforts to stregthen and improve the prevention, identification and treatment of child abuse and neglect.

(J) "Subject of the report" means any person reported under this chapter, including any child or parent, guardian, or other person responsible for the child's welfare.

(K) "Suspected report" means all initial reports of child abuse or neglect received pursuant to this article.

(L) "Unfounded reort" means a report made pursuant to this chapter for which there is no probable cause to believe that the child is abused or neglected. For the purposes of this article, it is presumed

that all reports are unfounded unless the local child protective agency determines otherwise.

(M) "Indicated report" means a report of child abuse or neglect supported by facts which warrant a finding that abuse or neglect is more likely than not to have occurred.

(N) "Probable cause" means facts and circumstances based upon accurate and reliable information, including hearsay, that would justify a reasonable person to believe that a child subject to a report under this article is abused or neglected.

(O) "Local child protective service agency" in a county or contiguous counties having prime responsibility for local efforts to strengthen and improve the prevention, identification and treatment of child abuse and neglect.

(P) "Child protective investigation" means any inquiry conducted by the local child protective service agency in response

to a report of child abuse or neglect made pursuant to this article.

HISTORY: Act No. 71 Section 1, eff May 19, 1981; 1982 Act No. 398, Section 21, eff June 7, 1982.

SUBARTICLE 3

IDENTIFICATION

SEC.

20-7-500. Persons or families needing assistance encouraged to seek it.

20-7-510. Persons to report.

20-7-520. Mandatory reporting to medical examiner or coroner; postmortem examinations.

20-7-530. Photographs and x-rays.

20-7-540. Immunity from liability.

20-7-550. Abrogation of privileged

communication.

20-7-560. Penalties.

20-7-570. (Renumbered).

20-7-580. (Renumbered).

20-7-590. (Renumbered).

Section 20-7-500. Persons or families needing assistance encouraged to seek it.

Any person seeking assistance in meeting child care responsibilites may use the services and facilities established by this article, including the single statewide telephone number and local child protective servicess where available. Such persons shall be

referred to appropriate community resources or agencies, notwithstanding whether the problem presented involves child abuse or neglect as defined by this article.

HISTORY: 1981 Act No. 71, Section 1, eff May 19, 1981.

Section 20-7-510. Persons to report.

(A) Any physician, nurse, dentist, optometrist, medical examiner or coroner, or any other medical, mental health or allied health professional, Christian Science practitioner, religious healer, school teacher or counselor, social or public assistance worker, child care worker in any day care center or child caring institution,

police or law enforcement officer or any judge having reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect is required to report or cause a report to be made in accordance with this section.

(B) Except as provided in (A) of this section, any other person who has reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse and neglect may report in accordance with this section.

(C) Reports of child abuse or neglect made pursuant to this section may be made orally, by telephone or otherwise to the county department of social services, or in the alternative, to a law enforcement agency in the county where the child resides or is found.

(1) Where reports are made pursuant to this section to a law enforce-

ment agency, it shall notify the county department of social services of its response to the report at the earliest possible time.

(2) Where a county or contiguous counties have established local child protective services, pursuant to Section 20-7-650, county department of social services shall immediately transfer reports pursuant to this section to the service.

HISTORY: 1981 Act No. 71, eff May 19, 1981.

Section 20-7-520. Mandatory reporting to medical examiner or coroner; postmortem examinations.

Any person required under subsection (a) of Section 20-7-510 to report cases of suspected child abuse or neglect, including workers of the local child protective service agency, who has reason to believe that a child has died

as a result of child abuse or neglect, shall report that fact to the appropriate medical examiner or coroner. Any other person who has reason to believe that a child has died as a result of child abuse or neglect may report that fact to the appropriate medical examiner or coroner. The medical examiner or coroner shall accept the report for investigation and shall report his findings to the appropriate law enforcement agency, circuit solicitor's office, the local child protective service agency or county department of social services, and, if the institution making a report is a hospital, to the hospital.

HISTORY: 1981 Act No. 71, Section 1, eff May 19, 1981.

Section 20-7-530. Photographs and x-rays.

Any person required to report under

Section 20-7-510 may take, or cause to be taken color photographs of the areas of trauma visible on a child who is the subject of a report and, if medically indicated, cause to be performed a radiological examination of the child without the consent of the child's parents or guardians. All photographs, negatives, and copies of them shall be sent to the appropriate local child protective service agency or county department of social services at the time a report pursuant to Section 20-7-510 is made, or as soon thereafter as possible.

HISTORY: 1981 Act No. 71, Section 1, eff May 19, 1981.

Section 20-7-540. Immunity from liability.

Any person required or permitted to report pursuant to this article or who participates in judicial proceedings

resulting therefrom, acting in good faith, shall be immune from civil and criminal liability which might otherwise result by reason of such actions. In all such civil or criminal proceedings good faith shall be rebuttably presumed.

HISTORY: 1981 Act No. 71, Section 1, eff May 19, 1981.

Section 20-7-550. Abrogation of privileged communication.

The privileged quality of communication between husband and wife and any professional person and his patient and client, except that between attorney and client or priest and pentinent, is abrogated and shall not constitute grounds for failure to report or the exclusion of evidence in any civil child protective proceeding resulting from a report pursuant to this article.

HISTORY: 1981 Act No. 71, Section 1, eff May 19, 1981.

Section 20-7-560. Penalties.

Any person required to report a case of child abuse or neglect, or any person required to perform any other function under this article, who knowingly fails to do so, or any person who threatens or attempts to intimidate a witness shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars or be imprisoned for not more than six months, or both.

HISTORY: 1981 Act No. 71, Section 1, eff May 19, 1981.

SUBARTICLE 5

INTERVENTION BY LAW ENFORCEMENT AGENCIES

SEC.
20-7-600. Taking child into custody;

notice to parents or others; release; transportation; peace officer's records.
20-7-610. Emergency protective custody.
20-7-620. Temporary detention of children.
20-7-630. Juvenile intake and probation services; review of recommendations as to intake; secrecy of files.

Section 20-7-600. Taking child into custody; notice to parents or others; release; transportation; peace officers' records.

(a) When a child found violating any law or ordinance, or whose surroundings are such as to endanger his welfare, is taken into custody such taking into custody shall not be termed an arrest.

The jurisdiction of the court shall attach from the time of such taking into custody. When a child is so taken into custody, such officers shall notify the parent, guardian or custodian of the child to a parent, a responsible adult, a responsible agent of a court approved foster home, group home, facility or program separate from any secure facility upon the written promise, signed by such person, to bring the child to court at a stated time or at such time as the court may direct. Such written promise, accompanied by a written report by the officer, shall be submitted to the Department of Juvenile Placement and Aftercare as soon as possible. If such person shall fail to produce the child as agreed, or upon notice from the court, a summons or a

warrant may be issued for the apprehension of such person or of the child.

(b) When a child is not released pursuant to subsection (a), the officer taking the child into custody shall immediately notify the authorized representative of the South Carolina Department of Juvenile Placement and Aftercare, who shall review the facts in the officer's report or petition and any other relevant facts and determine if there is a need for detention of the child. The officer's written report shall be furnished to the authorized representative of the Department of Juvenile Placement and Aftercare within twenty-four hours from the time the child was taken into custody and such report shall state: (1) the facts of the offense; and, (2) the

reason why the child was not released to the parent. Unless detention is necessary for the protection of the community or to serve the best interest of the child, the child shall be released by the authorized representative of the Department of Juvenile Placement and Aftercare to the custody of his parents or other responsible adult upon their written promise to bring the child to the court at a stated time or at such time as the court may direct. Provided, if the offense for which the child was taken into custody would be a felony the child may only be released by the authorized representative of the Department of Juvenile Placement and Aftercare with the consent of the officer who took the child into custody.

(c) No child shall be trans-

ported in any police vehicle which also contains adults under arrest. No child shall at any time be placed in a jail or other place of detention for adults, but shall be placed in a room or ward entirely separate from adults.

(d) Peace officer's records of children shall be kept separate from records of adults and shall not be open to public inspection, and shall be open to inspection only by such governmental agencies as authorized by the judge.

When the authorized representative of the Department of Juvenile Placement and Aftercare determines that detention is necessary, he shall make a diligent effort to place the child in an approved home, facility or program separate from any secure facility, when such alternatives are appropriate and

available. The Department of Juvenile Placement and Aftercare shall provide to the court a list of appropriate facilities to be utilized for such placement. When the Department of Juvenile Placement and Aftercare determines that a secure facility is necessary, a child may only be detained in a facility which has sight and sound separation from adults. The Department of Juvenile Placement and Aftercare shall develop specific written criteria to use in determining: (1) whether detention is necessary for the protection of the community to insure an orderly court process or to serve the best interest of the child, and (2) whether a secure or nonsecure facility is appropriate for detention of the child. The Department of Juvenile Placement and Aftercare shall also evaluate these criteria using accepted

research methods.

After January 1, 1982, a child who is taken into custody because of a violation of law which would not be a criminal offense under the laws of this State if committed by an adult shall not be placed in a detention facility.

If the authorized representative of the Department of Juvenile Placement and Aftercare has not released the child to the custody of his parents or other responsible adult, the court shall hold a detention hearing within forty-eight hours from the time the child was taken into custody, excluding Sundays and holidays, in accordance with rules of practice in a family court. At this hearing, the authorized representative of the Department of Juvenile Placement and Aftercare shall submit to the court a written report stating the facts surrounding the case and a

recommendation as to the child's continued detention pending the adjudicatory and dispositional hearings.

HISTORY: 1981 Act No. 71, Section 1, eff May 19, 1981; 1981 Act No. 178 Part II Section 36, eff July 29, 1981.

Section 20-7-610. Emergency protective custody.

(A) A law enforcement officer may take a child into protective custody without the consent of parents, guardians or others exercising temporary or permanent control over the child if:

(1) He has probable cause to believe that by reason of abuse or neglect, there exists an imminent danger to the child's life or physical safety.

(2) Parents, guardians or

others exercising temporary or permanent control over the child are unavailable or do not consent to the child's removal, from their custody.

(3) There is not time to apply for a court order pursuant to Section 20-7-736.

(B) When an officer takes custody of a child under this section he shall transport the child to a place previously designated for this purpose by the Family Court or the appropriate judicial circuit. In no case shall the place designated be a facility for the detention of criminal or juvenile offenders.

(C) When an officer takes custody of a child under this section he shall immediately notify the appropriate local child protective service agency and Family Court of the circuit and

shall make every reasonable effort to notify the parent, guardian or other person exercising temporary or permanent control over the child of the place of custody. The notification shall be in writing and shall include notice of the right to a hearing and right to counsel pursuant to this chapter.

(D) The local child protective service agency shall, upon such notification, commence a child protective investigation, including immediate attention to the protection of other children in the home, or other setting where the child was found. The agency shall then initiate a removal proceeding pursuant to Section 20-7-736 on or before the next working day in the appropriate Family Court. The Family Court shall schedule a

pretrial hearing pursuant to the provisions of Section 20-7-736 to be held within ten days of the initiation of the proceedings. At the pretrial hearing, the Court shall undertake to fulfill the requirements of Section 20-7-110 shall consider such matters as will promote a fair and expeditious trial, including a prima facie review of any emergency action taken or initiated in behalf of the child. The hearing to determine whether removal of custody is needed, pursuant to Section 20-7-736, shall be held within thirty days of the date of receipt of the removal petition.

(E) The Family Court may order ex parte that a child be taken into emergency protective custody without the consent of parents, guardians or others exercising

temporary or permanent control over the child if:

(1) The Family Court judge determines there is probable cause to believe that by reason of abuse or neglect there exists an imminent danger to the child's life or physical safety; and

(2) Parents, guardians or others exercising temporary or permanent control over the child are unavailable or do not consent to the child's removal from their custody.

(F) If the court issues such an order it shall schedule a pretrial hearing pursuant to the provisions of Section 20-7-736 and pursuant to the requirements of subsection (D) within ten days after the child was placed in custody.

(G) During the pendency

of the removal proceeding, any child place pursuant to this section shall remain in such placement until removal proceedings have been concluded.

HISTORY: 1981 Act No 71,
Section 1
eff May 19, 1981.

Section 20-7-620. Temporary detention of children.

Provisions shall be made for a detention home or homes for the temporary detention of children, to be conducted by the court, or, subject to the approval and supervision of the court, by other approppriate public agency; or the court may arrange for the use of private homes for such detention, subject to supervision of the court or other agency, or may arrange with any institution or agency to receive for temporary care and custody children

within the jurisdiction of the court.

Section 20-7-630. Juvenile intake and probation services; review of recommendations as to intake; secrecy of files.

Beginning July 1, 1978, the South Carolina Department of Juvenile Placement and Aftercare shall provide intake and probation services for juveniles brought before the family courts of this State and for persons committed or referred to the Department of Youth Services in cooperation with all local officials or agencies concerned. All recommendations by the Department of Juvenile Placement and Aftercare as to intake shall be reviewed by the office of the solicitor in the circuit concerned and the final determination as to whether or not the juvenile shall be prosecuted in family court shall be made by the solicitor or

of his authorized assistant. Statements of the juvenile contained in the Department of Juvenile Placement and Aftercare files shall not be furnished to the solicitor's office as part of the intake review procedure nor shall the solicitor's office be privy to such statements in connection with its intake review.

HISTORY: 1981 Act No. 71, Section 1, eff May 19, 1981.

SUBARTICLE 7

INTERVENTION BY CHILD WELFARE AGENCIES

SEC.

20-7-640. Duties of State Department of Social Services.

20-7-650. Duties of local child protective agency.

20-7-660. Information, training,

and publicity.

20-7-670. Institutional abuse and neglect.

20-7-680. Central registry.

20-7-690. Confidentiality of reports and records, penalties.

20-7-700. (Renumbered).

20-7-710. (Renumbered).

20-7-720. (Renumbered).

20-7-730. (Renumbered).

Section 20-7-640. Duties of State Department of Social Services.

(A) The Department of Social Services may maintain a toll-free number available to persons throughout the State for the referral of family-related problems, including:

(1) The reporting of known or suspected cases of child abuse or neglect.

(2) Other problems of a nature which may affect the stability of

family life.

Such telephone service shall operate continuously.

Upon receipt of a call involving suspected abuse or neglect, the Department of Social Services shall transmit the full contents of the report to the appropriate local child protective service agency. Immediately upon transmitting the report the Department of Social Services shall destroy the contents of the suspected report.

Upon receipt of a call involving other problems, of a nature which may affect the stability of family life, the Department of Social Services shall refer the call to the appropriate local child protective service agency or other service agency where appropriate.

(B) The Department of Social Services shall have within it a separate organizational unit administered within the Department with qualified staff and resources sufficient to fulfill the purposes and functions assigned to it by this article.

(C) State Department of Social Services responsibilities shall include, but not be limited to: assigning and monitoring initial child protection responsibility through periodic review of services offered throughout the State; assisting in the diagnosis of child abuse and neglect; coordinating referrals of known or suspected child abuse and neglect; measuring the effectiveness of existing child protection programs and facilitating research, planning and program development; and

establishing and monitoring a state-wide central registry for child abuse and neglect as hereinafter provided.

(D) The County Department of Social Services in each county is designated as the Child Protective Service Agency, whose duties are set forth in Section 20-7-650. The county in which the child resides shall be the legal place of venue; provided, that in conjunction with the powers enumerated in this section, each County Board of Social Services shall appoint an advisory board to be composed of resident professionals in the county in which the child resides in the fields of medicine, including nurses, education, health, social workers, members of the clergy, and law enforcement officials, if available for the purpose of determining the course of protective action to be taken by the County

Department of Social Services. These recommendations are to be deemed advisory only. These appointments to the advisory board shall be made in a nondiscriminatory manner.

HISTORY: 1981 Act No. 71, Section 1, eff May 19, 1981.

Section 20-7-650. Duties of local child protective agency.

(A) It is the purpose of this section to encourage the voluntary acceptance of any service offered by the child protective service agency in connection with child abuse and neglect, or any other problem of a nature affecting the stability of family life.

(B) The local child protective service agencies shall be adequately staffed with persons trained in the investigation of suspected child abuse

and neglect and in the provision of services to abused and neglected children and their families.

(C) Within twenty-four hours of the receipt of a report of suspected child abuse or neglect, the agency shall commence an appropriate and thorough investigation to determine whether a report of suspected child abuse or neglect is "indicated" or "unfounded". The findings shall be made no later than sixty days from the receipt of the report. In conducting the investigation if the facts so warrant the agency investigator may petition the Family Court of the appropriate judicial circuit for a warrant to inspect the premises and condition of the child subject of the report. The Family Court shall issue the inspection warrant upon probable

cause to believe the child is abused or neglected, as defined by this article.

(D) Indicated findings shall be based upon a finding of the facts available to the agency that abuse or neglect is more likely than not to have occurred; whenever the facts available to the agency indicate a lesser finding, determinations shall be deemed "unfounded". Indicated findings shall include a description of the services being provided the child and those responsible for his care, as well as all relevant dispositional information.

(E) Copies of indicated investigations of abuse and neglect shall be communicated immediately to the statewide Central Registry. The agency shall maintain a local registry and reports of child abuse shall be maintained in one of three categories:

Suspected, Unfounded or Indicated. All initial reports shall be deemed suspected. Reports of suspected abuse and neglect shall be maintained for no more than sixty days after the report was received by the agency. On or before the expiration of that time, they shall be converted into either unfounded or indicated reports, pursuant to the agency's investigation.

(1) Indicated reports shall be maintained on the central and local registries only when accompanied by supplemental information as required under subsection (D).

(2) Unfounded reports shall be classified "Unfounded by reason of insufficient evidence."

(3) If no finding has been made by the agency after sixty days from the date a report was received, it shall be classified "Unfounded

for want of an investigation."

(F) The names, addresses and all other identifying characteristics of all persons named in all unfounded reports shall be destroyed one year from the date that the last report has been determined to be unfounded; provided, however, that all information in any such report which is unnecessary for auditing purposes shall be destroyed immediately upon a determination that such report is unfounded and the remaining information shall be kept confidential except for auditing purposes. The names, addresses, birth dates and all other identifying characteristics of all persons named in indicated reports shall be destroyed seven years from the date services are terminated.

(G) The local child protective service agency shall be charged with

providing, directing or coordinating the appropriate and timely delivery of services to children found to be abused or neglected and those responsible for their care or others exercising temporary or permanent control over such children. "Services" shall not be construed to include emergency protective custody provided for in Section 20-7-736.

(H) Where the agency initiates protective services in cases of indicated physical, mental or sexual abuse, it shall notify the Family Court of the jurisdiction of the services offered within one week after the initiation of such services. The Family Court shall schedule a hearing within ninety days after receipt of the notice to determine:

(1) Whether the agency had reasonable cause to initiate the

protective services offered.

(2) Whether the services being offered are reasonable in light of the agency's justification for intervention.

(3) In all proceedings under this section the agency shall have the burden of proof by a preponderance of the evidence, except in cases where the agency has alleged mental injury, in which case the evidence must be clear and convincing.

(I) In cases where a report has been filed with the Central Registry, the outcome of these proceedings shall be communicated immediately by the agency to the Central Registry.

(J) If at any time after the initiation of protective services by the agency those receiving services indicate a refusal to cooperate, the agency shall withdraw. If the facts so warrant, the agency may petition

the Family Court to invoke the jurisdiction of the court under the Family Court Act to intervene, but in no case shall the agency threaten such action to coerce participation.

(K) The agency shall cooperate with law enforcement agencies and the circuit solicitor within the area it serves and establish such procedures as it deems necessary to facilitate the referral of child protection cases to the child protective services agency. Where the facts indicating abuse or neglect also appear to indicate a violation of criminal law, the agency shall notify the appropriate law enforcement agency of those facts for police investigation.

(L) The agency shall actively seek the cooperation and involvement of all local public and private institutions, groups, and programs

concerned with matters of child protection and welfare within the area it serves.

HISTORY: 1981 Act No. 71, Section 1, eff May 19, 1981.

Section 20-7-660. Information training and publicity.

(A) The Department of Social Services Protective Services and the local child protective services agencies shall, on a continuing basis, inform all persons required to report under this article of the nature, problem and extent of child abuse and neglect and of their duties and responsibilities in accordance with this article. The Department of Social Services and local agencies shall also, on a continuing basis, conduct training programs for local agency staffs as well as appropriate training for persons required to report under this article.

(B) The Department of Social Services Protective Services and the local child protective services agencies shall, on a continuing basis, inform the public of the nature, problem and extent of the child abuse and neglect and of the remedial and therapeutic services available to children and their families. The Department of Social Services and the local agencies shall also encourage families to seek help consistent with Section 20-7-500.

(C) The Department of Social Services Protective Services and the local child protective services agencies shall, on a continuing basis, actively publicize the appropriate telephone numbers to receive reports of suspected child abuse and neglect, including the twenty-four hour, statewide, toll-free telephone service and respective numbers of the local

child protective services agencies.

HISTORY: 1981 Act No. 71, Section 1, eff May 19, 1981.

Section 20-7-670. Institutional abuse and neglect.

(A) The Department of Social Services Child Protective Services shall be empowered to receive and investigate reports of institutional abuse and neglect and shall promulgate regulations consistent with this authority to investigate such reports and take remedial action, if necessary. In no case shall the Department of Social Services have responsibility for investigating allegations of abuse and neglect in institutions operated by the Department of Social Services.

The Department of Social Services shall take whatever steps it deems necessary to inform

potential reporters of institutional abuse and neglect of its responsibilities under this section.

(B) Subject to the provisions of subsection (A), the State Law Enforcement Division is empowered to receive and investigate reports of institutional abuse and neglect alleged to have occurred in any institution operated by the Department of Social Services and may promulgate regulations consistent with this authority to investigate such reports and take remedial action, if necessary.

The agency shall take whatever steps it deems necessary to inform potential reporters of institutional abuse and neglect of its responsibilities under this section.

HISTORY: 1981 Act No. 71, Section 1, eff may 19, 1981.

Section 20-7-680. Central registry.

(A) The purpose of this section is to establish a system for the identification of abused and neglected children and those who are responsible for their care, to provide a system for the coordination of reports concerning abused and neglected children and to provide data for determining the incidence and prevalence of child abuse and neglect in this State.

(B) The State Department of Social Services shall maintain a Central Registry of Child Abuse and Neglect within the Department of Social Services child protective services unit. The registry shall receive and maintain indicated reports of child abuse and neglect from county departments of social services and from local child

protective services agencies and it shall transmit information to authorized persons and agencies as provided in Section 20-7-690.

(C) Local child protective service agencies shall transmit monthly any data required by the Department of Social Services for purposes of statistical analysis and data gathering, subject to the limitations imposed on identifying characteristics contained in subsections (E) and (F) of Section 20-7-650.

(D) The Department of Social Services shall furnish annually to the Governor and the General Assembly a report on the incidence and prevalence of child abuse and neglect in South Carolina, the effectiveness of services provided throughout the State to protect children from such harm and any other data deemed instructive.

(E) The names, addresses, birthdates, and all other identifying characteristics of all persons named in indicated reports contained in the Registry shall be destroyed seven years from the date services are terminated.

HISTORY: 1981 Act No. 71 Section 1. eff may 19. 1981.

Section 20-7-690. Confidentiality of reports and records; penalties.

(A) All reports made pursuant to this article maintained by the State Department of Social Services, local child protective service agencies and the Central Registry of Child Abuse and Neglect shall be confidential. Any person who disseminates or permits the unauthorized dissemination of such information shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars or be imprisoned for not more

than six months, or both.

(B) Information contained in reports described in subsection (A) shall not be made available to any individual or institution except:

(1) Appropriate staff of the State Department of Social Services, local child protective services agencies and multidisciplinary evaluation teams empaneled by the agencies and law enforcement agencies investigating suspected cases of abuse and neglect.

(2) Any person who is the subject of a report, subject to the qualifications provided in subsection (C).

(3) Family Courts conducting child abuse and neglect or child protective proceedings.

(4) Any person engaged in a bona fide research purpose, with

written permission of the Commissioner of the State Department of Social Services, but no information regarding the names, addresses and other identifying characteristics of subjects of the report shall be made available to the researcher.

(5) Any person appointed as a child's guardian ad litem pursuant to Section 20-7-110.

(C) Any person who is the subject of a report made pursuant to this article shall be immediately notified of the fact that his name has been recorded by the State Department of Social Services, the local child protective services agency and, if applicable, the Central Registry of Child Abuse and Neglect. He shall also be informed of the findings of the investigation and whether or not his name has been destroyed in accordance with this

article. Any person who is the subject of a report shall be informed of his right to inspect the report and any substantiating data or evidence and his right to challenge any part of its contents. The only details of the report which shall be withheld from the subject's knowledge or inspection are the name, address, occupation and all other identifying characteristics of the reporter.

(D) For the purpose of this section, "any person who is the subject of a report" shall mean the child and any person who is alleged or determined to have abused or neglected the child, who is mentioned by name in a report or finding.

HISTORY: 1981 Act No. 71, Section 1, eff May 19, 1981.

PROCEDURES FOR FAMILY COURTS

SUBARTICLE 1

ABUSED, NEGLECTED AND

DELINQUENT CHILDREN

SEC.

20-7-735. (Renumbered).

20-7-736. Jurisdiction of family court under article; removal proceedings; procedures.

20-7-740. Preliminary inquiry and informal action by courts; contents, verification, and filing of petition; investigation; notice.

20-7-745. Service of summons, process of service.

20-7-750. Failure to obey summons or process: issuance of warrant.

20-7-755. Conduct of hearings.

20-7-760. Rules for conduct of hearings; evidence; adjournment;

temporary order for support.

20-7-765. (Renumbered).

20-7-770. (Renumbered).

20-7-775. (Renumbered)

20-7-780. Records, confidential information; names and pictures of children shall not be made public; fingerprints.

Section 20-7-736. Jurisdiction of family court under article; removal proceedings; procedures.

(A) The Family Court shall have exclusive jurisdiction over all proceedings held pursuant to this article.

(B) Upon investigation of a report received under Section 20-7-650 or at any time during the delivery of services by the agency, the local child protective services agency may petition the Family Court in its jurisdiction to remove the child from

custody of the parent or guardian when the agency has probable cause to believe removal is necessary to protect the child's health or welfare.

(C) The petition shall contain a full description of the reasons why the child cannot be protected adequately in the custody of the parent or guardian, including a descriptioin of the condition of the child, any previous efforts to work with the parent or guardian, in-home treatment programs which have been offered and proven inadequate and the attitude of the parent or guardian towards placement of the child in an alternative setting. The petition shall also contain a statement of the harms the child is likely to suffer as a result of removal and a description of the steps that will be taken to minimize the harm to the child

that may result upon removal.

(D) Upon receipt of a removal petition under this section, the Family Court shall schedule a hearing to be held within thirty days of the date of receipt to determine whether removal is necessary.

The Family Court shall notify the parent or guardian of the hearing by delivering a copy of the petition, together with a notice of the hearing, which shall include the date and time of the hearing and an explanation of the right of the parent or guardian to have an attorney under Section 20-7-110. The Family Court shall effect delivery at least twenty-four hours prior to the hearing. The respondent shall be allowed to seek leave of court for a continuation of not less than forty-eight hours.

(E) A child shall not be removed from the custody of the parent or guardian unless the court finds that:

(1) The child has been physically injured as defined in Section 20-7-490 and there is a preponderance of the evidence that the child cannot be protected from further physical injury without being removed.

(2) the child has been endangered as otherwise defined in Section 20-7-490 and there is clear and convincing evidence that the child cannot be protected from further harm of the type justifying intervention without being removed.

(3) There is an alternative placement available but in no case shall the placement be a facility for detention of criminal or juvenile

offenders.

(F) The petition for removal may include a petition for termination of parental rights under the jurisdiction conferred on the Family Court by the Family Court Act.

HISTORY: 1981 Act No. 71, Section 1, eff May 19, 1981; 1982 Act no. 398, Section 9, eff June 7 1982.

CHAPTER 10 (new)

Child Protection Act of 1977

SEC.

20-10-10. Short title.

20-10-20. Definitions.

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20-10-40. Persons or families needing assistance encouraged to seek it.

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20-10-110. Duties of State Department of Social Services.

20-10-120. Duties of the local child protective agency.

20-10-130. Central Registry.

20-10-140. Confidentiality of reports and records; penalties.

20-10-150. Information, training and publicity.

20-10-160. Institutional abuse and neglect.

20-10.170. Removal.

20-10-180. Legal representation.

20-10-190. Penalties.

Section 20-10-10. Short title.

This chapter shall be known as the Child Protection Act of 1977.

Section 20-10-20. Definitions.

When used in this chapter and unless the specific content indicates otherwise:

(A) "Child" means a person under the age of eighteen.

(B) "Abused or neglected child" means a child whose physical or mental health or welfare is harmed or threatened with harm, as defined by items (C) and (D) of this section, by the acts or omissions of his parent, guardian or other person responsible for his welfare.

(C) "Harm" to a child's health or welfare can occur when the parent,

guardian or other person responsible for his welfare:

(1) Inflicts of allows to be inflicted upon the child physical or mental injuries, including injuries sustained as a result of excessive corporal punishment, but excluding corporal punishment or physical discipline which meets each of the following guidelines:

(a) The physical aggression must be administered by a parent or person in loco parentis.

(b) It must be perpetrated for the sole purpose of restraining or correcting the child.

(c) The force or violence of the discipline must be reasonable in manner and moderate in degree.

(d) the force and violence of the discipline must not have brought about permanent or lasting damage to the child.

(c) The behavior of the parent must not be reckless or grossly negligent.

(2) Commits or allows to be committed against the child a sexual offense as defined by the laws of the State.

(3) Fails to provide the child with adequate food, clothing, shelter, education as required under Article 1 of Chapter 65 of Title 59, or health care though financially able to do so or offered financial or other reasonable means to do so. For the purpose of this chapter "adequate health care" includes any medical or nonmedical health care permitted or authorized under state law.

(4) Abandons the child, as defined by Section 20-11-20, Code of Laws of South Carolina, 1976.

(5) Encourages, condones or approves the commission of delinquent

acts by the child and commission of the acts are shown to be the result of the encouragement, condonation or approval.

(D) "Threatened harm" means a substantial risk of harm, as defined by item (C).

(E) "A person responsible for a child's welfare" includes the child's parent, guardian, foster parent, an employee of a public or private residential home, institution or agency, or other person legally responsible for the child's welfare in a residential setting.

(F) "Physical injury" means death, disfigurement or impairment of any bodily organ.

(G) "Mental injury" means a substantial impairment of the intellectual, psychological or emotional capacity of a child as evidenced by inhumane or unconscionable

acts and conduct. Provided, nothing herein shall be construed as prohibiting a person responsible for a child's welfare from imposing reasonable restrictions deemed necessary by such person for the intellectual, psychological or emotional well-being of the child by any of the following means or methods:

(1) Restrictions relating to attendance at amusements, concerts, social events or activities, or theaters.

(2) restrictions on amount of exposure to secular activities such as television, extra-curricular school activities or community recreational activities.

(3) instructions, directions, or mandates relating to public or private elementary and secondary education or attendance at churches

or other places of religious worship.

(H) "Institutional child abuse and neglect" means situations of known or suspected child abuse or neglect where the person responsible for the child's welfare is the employee of a public or private residential home, institution or agency.

(I) "Protective Services Unit" means the unit established within the Department of Social Services which shall have prime responsibility for state efforts to strengthen and improve the prevention, identification and treatment of child abuse and neglect.

(J) "Subject of the report" means any person reported under this chapter, including any child or parent, guardian or other person responsible for the child's welfare.

(K) "Suspected report" means all initial reports of child abuse or neglect received pursuant to this

chapter.

(L) "Unfounded report" means a report made pursuant to this chapter for which there is not probable cause to believe that the child is abused or neglected. For purposes of this chapter, it is presumed that all reports are unfounded unless the local child protective service agency determines otherwise.

(M) "Indicated report" means a report of child abuse or neglect supported by facts which warrant a finding that abuse or neglect is more likely than not to have occurred.

(N) "Probable cause" means facts and circumstances based upon accurate and reliable information, including hearsay, that would justify a reasonable person to believe that a child subject to a report under this chapter is abused or neglected.

(O) "Local child protective service agency" means the agency in a county or contiguous counties having prime responsibility for local efforts to strengthen and improve the prevention, identification and treatment of child abuse and neglect.

(P) "Child protective investigation" means any inquiry conducted by the local child protective service agency in response to a report of child abuse or neglect made pursuant to this chapter.

HISTORY: 1977 Act No. 187 Section 4; 1978 Act No. 497 Section 1, eff May 5, 1978.

Section 20-10-30. Purpose.

Recognizing that abused and neglected children in South Carolina need protection, it is the purpose of this chapter to save them from injury and harm by establishing an effective

reporting system and encouraging the reporting of children in need of protection; by establishing an effective system of services throughout the State to safeguard the well-being and development of endangered children and to preserve and stabilize family life, whenever appropriate; by establishing fair and equitable procedures, compatible with due process of law to intervene in family life with due regard to the safety and welfare of all family members and by establishing an effective system of protection of children from injury and harm while living in public and private residential agencies and institutions meant to serve them.
HISTORY: 1977 Act No. 187 Section 2.

Section 20-10-40. Persons or families needing assistance encouraged to seek it.

Any person seeking assistance in

meeting child care responsibilities may use the services and facilities established by this chapter, including the single statewide telephone number and local child protective services where available. Such persons shall be referred to appropriate community resources or agencies, nothwithstanding whether the problem presented involves child abuse or neglect as defined by this chapter.

HISTORY: 1977 act No 187 Section 3.

Section 20-10-50.

(A) Any physician, nurse, dentist, optometrist, medical examiner, or coroner, or any other medical, mental health, or allied health professional, Christian Science practitioner, religious healer, school teacher or counselor, social or public assistance worker, child care worker in any day care center or child

caring institution, police or law enforcement officer or any judge having reason to believe that a child's physical or mental health has been or may be adversely affected by abuse or neglect is required to report or cause a report to be made in accordance with this section.

(B) Except as provided in (A) of this section, any other person who has reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect may report in accordance with this section.

(C) Reports of child abuse or neglect made pursuant to this section may be made orally, by telephone or otherwise to the county department of social services, or in the alternative, to a law enforcement agency in the county where the child resides or is found.

(1) Where reports are made pursuant to this section to a law enforcement agency, it shall notify the county department of social services of its response to the report at the earliest possible time.

(2) Where a county or contiguous counties have established local child protective services, pursuant to Section 20-10-20, the county department of social services shall immediately transfer reports pursuant to this section to the service.

HISTORY: 1977 Act No 187 Section 5, 1978 Act No. 497 Section 2, eff May 5, 1976.

Section 20-10-60. Mandatory reporting to a medical examiner or coroner, postmortem examinations.

Any person required under Section 20-10-50(A) to report cases of suspected child abuse or neglect, including

workers of the local child protective service agency, who has reason to believe that a child has died as a result of child abuse or neglect, shall report that fact to the appropriate medical examiner or coroner. Any other person who has reason to believe that a child has died as a result of child abuse or neglect may report that fact to the appropriate medical examiner or coroner. The medical examiner or coroner shall accept the report for investigation and shall report his findings to the appropriate law enforcement agency, circuit solicitor's office, the local child protective service agency or county department of social services and, if the institution making a report is a hospital, to the hospital.

HISTORY: 1977 Act No 187 Section 6.

Section 20-10-70. Photographs and

x-rays.

Any person required to report under Section 20-10-50 may take, or cause to be taken color photographs of the areas of trauma visible on a child who is the subject of a report, and, if medically indicated, cause to be performed a radiological examination of the child without the consent of the child's parents or guardians. All photoographs, negatives, and copies of them shall be sent to the appropriate local child protective service agency or county department of social services at the time a report pursuant to Section 20-10-50 is made, or as soon thereafter as possible.

HISTORY: 1977 Act No 187 Section 7; 1978 Act No. 497 Section 3, eff May 5, 1978.

Section 20-10-80. Emergency protective

custody.

(A) A law enforcement officer may take a child into protective custody without the consent of parents, guardians or others exercising temporary or permanent control over the child if:

(1) He has probable cause to believe that by reason of abuse or neglect there exists an imminent danger to the child's life or physical safety.

(2) Parents, guardians or others exercising temporary or permanent control over the child are unavailable or do not consent to the child's removal from their custody.

(3) There is not time to apply for a court order pursuant to Section 20-10-70.

(B) When an officer takes custody of a child under this section he shall transport the child to a place

previously designated for this purpose by the Family Court of the appropriate judicial circuit. In no case shall the place designated be a facility for the detention of criminal or juvenile offenders.

(C) When an officer takes custody of a child under this section he shall immediately notify the appropriate local child protective service agency and Family Court of the circuit and shall make every reasonable effort to notify the parent, guardian or other person exercising temporary or permanent control over the child of the place of custody. The notification shall be in writing and shall include notice of the right to a hearing and right to counsel pursuant to this chapter.

(D) The local child

protective service agency shall, upon such notification, commence a child protective investigation, including immediate attention to the protection of other children in the home, or other setting where the child was found. The agency shall then initiate a removal proceeding pursuant to Section 20-10-170 on or before the next working day in the appropriate Family Court. The Family Court shall schedule a pretrial hearing pursuant to the provisions of Section 20-10-170 to be held within ten days of the initiation of the proceedings. At the pretrial hearing, the Court shall undertake to fulfill the requirements of Section 20-10-180 and shall consider such matters as will promote a fair and expeditious trial, including a prima facie review of any emergency action taken or initiated in behalf of the child. The hearing to determine whether removal

of custody is needed, pursuant to Section 20-10-170, shall be held within thirty days of the date of receipt of the removal petition.

(E) The Family Court may order ex aprte that a child be taken into emergency protective custody without the consent of parents, guardians or others exercising temporary or permanent control over the child if:

(1) The Family Court judge determines there is probable cause to believe that by reason of abuse or neglect there exists an imminent danger to the child's life or physical safety: and

(2) Parents, guardians or others exercising temporary or permanent control over the child are unavailable or do not consent to the child's removal from their custody.

(F) If the court issues such an order it shall schedule a pretrial hearing pursuant to the provisions of Section 20-10-170 and pursuant to the requirements of subsection (D) within ten days after the child was placed in custody.

(G) During the pendency of the removal proceeding, any child placed pursuant to this section shall remain in such placement until removal proceedings have been conducted.

HISTORY: 1977 Act No. 187 Section 8; 1978 Act No. 497 Section 9, eff May 5, 1978; 1980 Act No. 498, eff June 11, 1980.

Section 20-10-90. Immunity from liability.

Any person required or permitted to report pursuant to this chapter or who participates in judicial proceedings resulting therefrom, acting in good

faith, shall be immune from civil and criminal liability which might otherwise result by reason of such actions. In all such civil or criminal proceedings good faith shall be rebuttably presumed.

HISTORY: 1977 Act No 187 Section 9.

Section 20-10-100. Abrogation of privileged communication.

The privileged quality of communication between husband and wife and any professional person and his patient or client, except that between attorney and client or priest and penitent, is abrogated and shall not constitute grounds for failure to report or the exclusion of evidence in any civil child protective proceeding resulting from a report pursuant to this chapter.

HISTORY: 1977 Act No. 187 Section 10.

Section 20-10-110. Duties of the State Department of Social Services.

(A) The Department of Social Services may maintain a toll-free number available to persons throughout the State for the referral of family related problems, including:

(1) The reporting of known or suspected cases of child abuse or neglect.

(2) Other problems of a nature which may affect the stability of family life.

Such telephone service shall operate continuously.

Upon receipt of a call involving suspected abuse or neglect, the Department of Social Services shall transmit the full contents of the report to the appropriate local child protective service agency. Immediately upon transmitting the report, the Department of Social

Services shall destroy the contents of the suspected report.

Upon receipt of a call involving other problems of a nature which may afect the stability of family life, the Department of Social Services shall refer the call to the appropriate local child protection service agency or other service agency where appropriate.

(B) The Department of Social Services shall have within it a separate organizational unit administered within the Department with qualified staff and resources sufficient to fulfill the purposes and functions assigned to it by this chapter.

(C) State Department of Social Services responsibilities shall include, but not be limited to: assigning and monitoring initial child protection responsibility through periodic review

of services offered throughout the State; assisting in the diagnosis of child abuse and neglect; measuring the effectiveness of existing child protection programs and facilitating research, planning and program development; and establishing and monitoring a statewide central registry for child abuse and neglect as hereinafter provided.

(D) The County Department of Social Services in each county is designated as the Child Protective Service Agency, whose duties are set forth in Section 20-10-120. The county in which the child resides shall be the legal place of venue, provided, that in conjunction with the powers enumerated in this section, each County Board of Social Services shall appoint an advisory board to be composed of resident professionals in the county in which the child resides

in the fields of medicine, including nurses, education, health, social workers, members of the clergy and law enforcement officials, if available for the purpose of determining the course of protective action to be taken by the County Department of Social Services. These recommendations are to be deemed advisory only. These appointments to the advisory board shall be made in a nondiscriminatory manner.

HISTORY: 1977 Act No 187 Section 11.

Section 20-10-120. Duties of the local child protective agency.

(A) It is the purpose of this section to encourage the voluntary acceptance of any service offered by the child protective service agency in connection with child abuse and

neglect, or any other problem of a nature affecting the stability of family life.

(B) The local child protective service agencies shall be adequately staffed with persons trained in the investigation of suspected child abuse and neglect and in the provision of services to abused and neglected children and their families.

(C) Within twenty-four hours of the receipt of a report of suspected child abuse or neglect, the agency shall commence an appropriate and thorough investigation to determine whether a report of suspected child abuse or neglect is "indicated" or "unfounded". The finding shall be made no later than sixty days from the receipt of the report. In conducting the investigation if the facts so warrant the agency investigator may petition the Family Court of the appropriate judicial

circuit for a warrant to inspect the premises and condition of the child subject of the report. The Family Court shall issue the inspection warrant upon probable cause to believe the child is abused or neglected, as defined by this chapter.

(D) Indicated findings shall be based upon a finding of the facts available to the agency that abuse or neglect is more likely than not to have occurred; whenever the facts available to the agency indicate a lesser finding, determinations shall be deemed "unfounded". Indicated findings shall include a description of the services being provided the child and those responsible for his care, as well as all relevant dispositional information.

(E) Copies of indicated

investigations of abuse and neglect shall be communicated immediately to the statewide Central Registry. The agency shall maintain a local registry and reports of child shall be maintained in one of three categories: Suspected, Unfounded or Indicated. All initial reports shall be deemed suspected. Reports of suspected abuse and neglect shall be maintained for no more than sixty days after the report was received by the agency. On or before the expiration of that time, they shall be converted into either unfounded or indicated reports, pursuant to the agency's investigation.

(1) Indicated reports shall be maintained on the central and local registries only when accompanied by supplemental information as required under subsection (D).

(2) Unfounded reports shall be classifed "Unfounded by reason of

insufficient evidence."

(3) If no finding has been made by the agency after sixty days from the date a report was received, it shall be classified "Unfounded for want of an investigation."

(F) The names, addresses and all other identifying characteristics of all persons named in all unfounded reports shall be destroyed one year from the date that the last report has been determined to be unfounded; provided, however, that all information in any such report which is unnecessary for auditing purposes shall be destroyed immediately upon a determination that such report is unfounded and the remaining information shall be kept confidential except for auditing purposes. The names, addresses, birth dates and all other identifying characteristics of all persons named

in indicated reports shall be destroyed seven years from the date services are terminated.

(G) The local child protective service agency shall be charged with providing, directing or coordinating the appropriate and timely delivery of services to children found to be abused or neglected and those responsible for their care or others exercising temporary or permanent control over such children. "Services" shall not be construed to include emergency protective custody provided for in Section 20-10-170.

(H) Where the agency initiates protective services in cases of indicated physical, mental or sexual abuse, it shall notify the Family Court of the jurisdiction of the services offered within one week after the initiation of such services. The Family Court shall schedule a

hearing within ninety days after receipt of the notice to determine:

(1) Whether the agency had reasonable cause to initiate the protective services offered.

(2) Whether the services being offered are reasonable in light of the agency's justification for intervention.

(3) In all proceedings under this section the agency shall have the burden of proof by a preponderance of the evidence, except in cases where the agency has alleged mental injury, in which case the evidence must be clear and convincing.

(I) In cases where a report has been filed with the Central Registry, the outcome of these proceedings shall be communicated immediately by the agency to the Central Registry.

(J) If at any time after the

initiation of protective services by the agency those receiving services indicate a refusal to cooperate, the agency shall withdraw. If the facts so warrant, the agency may petition the Family Court to invoke the jurisdictio of the court under the Family Court Act to intervene, but in no case shall the agency threaten such action to coerce participation.

(K) The agency shall cooperate with law enforcement agencies and the circuit solicitor within the area it serves and establish such procedures as it deems necessary to facilitate the referral of child protection cases to the child protective services agency. Where the facts indicating abuse or neglect also appear to indicate a violation of criminal law, the agency shall notify the appropriate law enforcement agency of those facts for police investigation.

(L) The agency shall actively

seek the cooperation and involvement of all local public and private institutions, groups, and programs concerned with matters of child protection and welfare within the area it serves.

HISTORY: 1977 Act No 187 Section 12; 1978 Act No. 497 Section 4, eff May 5, 1978.

Section 20-10-130. Central registry.

(A) The purpose of this section is to establish a system for identification of abused and neglected children and those who are responsible for their care, to provide a system for the coordination of reports concerning abused and neglected children and to provide data for determining the incidence and prevalence of child abuse and neglect in the State.

(B) The State Department of Social Services shall maintain

a Central Registry of Child Abuse and Neglect within the Department of Social Services child protective services unit. The registry shall receive and maintain indicated reports of child abuse and neglect from county departments of social services and from local child protective service agencies and it shall transmit information to authorized persons and agencies as provided in Section 20-10-140.

(C) Local child protective service agencies shall transmit monthly any data required by the Department of Social Services for purposes of statistical analysis and data gathering, subject to the limitations imposed on identifying characteristics contained in Section 20-10-120 (E) and (F).

(D) The Department of

Social Services shall furnish anually to the Governor and the General Assembly a report on the incidence and prevalence of child abuse and neglect in South Carolina, the effectiveness of services provided throughout the State to protect children from such harm and any other data deemed instructive.

(E) The names, addresses, birthdates, and all other identifying characteristics of all persons named in indicated reports contained in the Registry shall be destroyed seven years from the date services are terminated.

HISTORY: 1977 Act No. 187 Section 13; 1978 Act No. 497 Section 5, eff May 5, 1978.

Section 20-10-140. Confidentiality of reports and records; penalties.

(A) All reports made pursuant

to this chapter maintained by the State Department of Social Services, local child protective service agencies and the Central Registry of Child Abuse and Neglect shall be confidential. Any person who disseminates or permits the unauthorized dissemination of such information shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars or be imprisoned for not more than six months or both.

(B) Information contained in reports described in subsection (A) shall not be made available to any individual or institution except:

(1) Appropriate staff of the State Department of Social Services, local child protective services agencies and multidisciplinary evaluation teams empaneled by the agencies and law enforcement agencies investi-

gating suspected cases of abuse and neglect.

(2) Any person who is the subject of a report, subject to the qualifications provided in sub-section (C).

(3) Family Courts conducting child abuse and neglect or child protective proceedings.

(4) Any person engaged in a bona fide research purpose, with written permission of the Commissioner of the State Department of Social Services, but no information regarding the names, addresses and other identifying characteristics of subjects of the report shall be made available to the researcher.

(5) Any person appointed as a child's guardian ad litem pursuant to this chapter.

(C) Any person who is the

subject of a report made pursuant to this chapter shall be immediately notified of the fact that his name has been recorded by the State Department of Social Services, the local child protective services agency and, if applicable, the Central Registry of Child Abuse and Neglect. He shall also be informed of the findings of the investigation and whether or not his name has been destroyed in accordance with this chapter. Any person who is the subject of a report shall be informed of his right to inspect the report and any substantiating data or evidence and his right to challenge any parts of its contents. The only details of the report which shall be withheld from the subject's knowledge or inspection are the name, address, occupation and all other identifying characteristics of the reporter.

(D) For the purpose of this section, "any person who is the subject of a report" shall mean the child and any person who is alleged or determined to have abused or neglected the child, who is mentioned by name in a report or finding.

HISTORY: 1977 Act No. 187 Section 14; 1978 Act No. 497 Sections 6,11, eff May 5, 1978.

Section 20-10-150. Information, training and publicity.

(A) The Department of Social Services Protective Services and the local child protective services agencies shall, on a continuing basis, inform all persons required to report under this chapter of the nature, problem and extent of child abuse and neglect and of their duties and responsibilities

in accordance with this chapter. The Department of Social Services and local agencies shall also, on a continuing basis, conduct training programs for local agency staff as well as appropriate training for persons required to report under this chapter.

(B) The Department of Social Services Protective Services and the local child protective services agencies shall, on a continuing basis, inform the public of the nature, problem and extent of the child abuse and neglect and of the remedial and therapeutic services available to children and their families. The Department of Social Services and the local agencies shall also encourage families to seek help consistent with Section 20-10-40.

(C) The Department of Social Services Protective Services and the local child protective services agencies shall, on a continuing basis, actively publicize the appropriate telephone numbers to receive reports of suspected child abuse and neglect, including the twenty-four hour, state-wide, toll-free telphone service and respective numbers of the local child protective services agencies.
HISTORY: 1977 Act No. 187 Section 15.

Section 20-10-160. Istitutional abuse and neglect.

(A) The Department of Social Services Child Protective Services shall be empowered to receive and investigate reports of institutional abuse and neglect and shall promulgate regulations consistent with this authority to investigate such reports and take remedial action, if necessary.

In no case shall the Department of Social Services have responsibility for investigating allegations of abuse and neglect in institutions operated by the Department of Social Services.

The Department of Social Services shall take whatever steps it deems necessary to inform potential reporters of institutional abuse and neglect of its reponsibilities under this section.

(B) Subject to the provisions of subsection (A), the State Law Enforcement Divison is empowered to receive and investigate reports of institutional abuse and neglect alleged to have occurred in any institution operated by the Department of Social Services and may promulgate regulations consistent with this authority to investigate such reports and take remedial action, if necessary.

The agency shall take whatever steps it deems necessary to inform potential reporters of institutional abuse and neglect of its reponsibilities under this section.

HISTORY: 1977 Act No. 187 Section 16.

Section 20-10-170. Removal.

(A) The Family Court shall have exclusive jurisdiction over all proceedings held pursuant to this chapter.

(B) Upon investigation of a report received under Sectio 20-10-120, or at any time during the delivery of services by the agency, the local child protective services agency may petition the Family Court in its jurisdiction to remove the child from custody of the parent or guardian when the agency has probable cause to believe removal is necessary to protect the child's health or welfare.

(C) The petition shall contain a full description of the reasons why the child cannot be protected adequately in the custody of the parent or guardian, including a description of the condition of the child, any previous efforts to work with the parent or guardian, in-home treatment programs which have been offered and proven inadequate and the attitude of the parent or guardian towards placement of the child in an alternative setting. The petition shall also contain a statement of the harms the child is likely to suffer as a result of removal and a description of the steps that will be taken to minimize the harm to the child that may result upon removal.

(D) Upon receipt of a removal petition under this section, the Family Court shall schedule a

hearing to be held within thirty days of the date of receipt to determine whether removal is necessary.

(E) A child shall not be removed from the custody of the parent or guardian unless the court finds that:

(1) The child has been physically injured as defined in Section 20-10-20 and there is a preponderance of the evidence that the child cannot be protected from further physical injury without being removed.

(2) The child has been endangered as otherwise defined in Section 20-10-20 and there is clear and convincing evidence that the child cannot be protected from further harm of the type justifying intervention without being removed.

(3) There is an alternative placement available but in no case shall the placement be a facility for

detention of criminal or juvenile offenders.

(F) The petition for removal may include a petition for termination of parental rights under the jurisdiction conferred on the Family Court by the Family Court Act.

HISTORY: 1977 Act No. 187 Section 17; 1978 Act No. 497 Sections 7,8, May 5 1978; 1980 Act No. 497, eff June 11, 1980.

Section 20-10-180. Legal representation.

(A) Any child subject to any judicial proceeding under this chapter may be appointed legal consel and a guardian ad litem by the Family Court. Counsel for the child shall in no case be the same as counsel for the parent, guardian or other person subject to the proceeding or any governmental or social agency involved in the proceeding.

(B) Parents, guardians or other persons subject to any judicial

proceeding under this chapter shall be entitled to legal counsel. Those persons unable to afford legal representation shall be appointed counsel by the Family Court.

(C) The interests of the State and the local child protective services agency shall be represented by the circuit solicitor or his representative in the appropriate judicial circuit in any judicial proceeding under this chapter.

HISTORY: 1977 Act No. 187 Section 18.

Section 20-10-190. Penalties.

Any person required to report a case of child abuse or neglect, or any person required to perform any other functions under this chapter, who knowingly fails to do so, or any person who threatens or attempts to intimidate a witness shall be deemed guilty of a misdemeanor and upon conviction shall be

fined not more than five hundred dollars or be imprisoned for not more than six months, or both.

HISTORY: 1977 Act No. 187 Section 19; 1978 Act No. 497 Section 10, eff May 5, 1978.

Office-Supreme Court, U.S.
FILED
FEB 19 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1159

In The
Supreme Court of the United States
October Term, 1984

KAROLE K. JENSEN, AS ADMINISTRATRIX OF THE ESTATES OF SYLVIA BROWN AND MICHAEL CLARK, DECEASED,

Petitioner,

v.

VIRGIL L. CONRAD, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF ALL RESPONDENTS

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February 15, 1985.

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QUESTIONS PRESENTED

I. IS THERE A FEDERAL CONSTITUTIONAL RIGHT TO BE PROTECTED BY THE STATE FROM HARM AT THE HANDS OF ONE'S PARENTS?

II. ARE THE DEFENDANTS ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE ALLEGED RIGHT, IF IT EXISTS, WAS NOT CLEARLY ESTABLISHED AT THE TIME OF THE DESCENDENTS' DEATHS?

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STATEMENT OF THE CASE

In reviewing the decisions of the district court in these consolidated appeals the United States Court of Appeals for the Fourth Circuit identified two issues for determination:

> The appellants' contentions, we believe, hinge on two "threshold" issues: whether the fourteenth amendment affords the appellants a right to affirmative protection by the state, and if such a right presently exists whether it was established clearly enough at the time the alleged deprivation occurred to avert the application of good faith immunity under *Harlow* [*v. Fitzgerald,* 457 U.S. 800 (1982)].

(A-22) In answering these questions the court traced the development of a constitutional right to affirmative protection by the state. The court examined cases in which courts had found the existence of a right to be protected by government from harm at another's hands. The "most relevant line of cases" found by the court were those cases, beginning with this Court's opinion in *Estelle v. Gamble,* 429 U. S. 97 (1976), that declare an affirmative obligation on the part of government to protect prisoners by providing for their medical care. Several decisions of the Fourth Circuit as late as 1980 expanded the eighth amendment protection found in *Estelle* to include an affirmative duty to protect inmates from harm at the hands of other inmates. The court pointed out, however, that in 1980 its decisions had limited the imposition of an affirmative duty of protection to prison settings involving eighth amendment concerns (A-28).

The court's evaluation of the development of the law led it to conclude that their decisions after 1980 arguably bridged the gap between eighth amendment protections and fourteenth amendment analysis. The court found that a right to affirmative protection and corollary governmental duty could arise under the fourteenth amendment in the presence of "special custodial or other relationships created or assumed by the state in respect of particular persons." The court made it clear, however, that an affirmative duty of protection under the fourteenth amendment outside of a prison setting was not established until after 1980.

Because no right of protection under the fourteenth amendment, was clearly established at the time of these children's deaths, the court held consistent with the reasoning outlined in *Harlow v. Fitzgerald,* 457 U.S. at 818, that the defendants are entitled to good faith immunity as a complete defense from Section 1983 liability. The court reasoned that the defendants could not fairly be required to anticipate the development of the "special relationship" right that resulted from the expansion of eighth amendment protections into fourteenth amendment analysis. Even assuming that the defendants could have anticipated these developments, the court also found that it is not clear that the defendants should have foreseen that a "special relationship" existed on the facts of this case.

> Given the absence of specific guidelines to determine precisely what constitutes a "special relationship" and the particular "close" nature of the factual case before us, we would be hardpressed to conclude that the law as it affected the defendants was "clearly established."

(A-45) The Fourth Circuit held that though the fourteenth amendment may afford the appellants a right of affirmative protection by the state, such a right was not established clearly enough at the time the alleged deprivation occurred to avert the application of good faith immunity under *Harlow*.

ARGUMENT

The Petitioner relies on two grounds in support of her Petition for Writ of Certiorari. She maintains that the writ should issue because (1) the problem of child abuse is of great importance to the public and (2) the Fourth Circuit's application of the good faith immunity defense would stagnate the development of civil rights law.

I. State Statutes Do Not Create Federal Rights.

While it is true that the problems of child abuse and neglect are serious and of great public concern, most of the issues that reach the court are of great public importance. This fact alone does not support the grant of a Writ of Certiorari. Petitioner argues, however, that because the petition raises the question of what constitutional duties are created by state child abuse prevention statutes, this Court's consideration of the issues presented are of particular national significance.

The question of whether state statutes may give rise to federally protected rights is squarely addressed in this Court's decision in *Egar v. City of Aurora*, 365 U.S. 514 (1961). The court in *Egar* clearly held that state statutes do not give rise to rights enforceable under Title 42 U.S.C.

Section 1983. The petitioner concedes as much in her petition at pages 36 and 37. There is, therefore, no reason for the Court to examine the effect of these statutes under Section 1983.

II. The Fourth Circuit Properly Applied the Defense of Qualified Immunity.

The second ground raised by the Petitioner, likewise, does not warrant granting a Writ of Certiorari in this case. The Fourth Circuit's application of the good faith immunity defense is in strict accordance with this Court's decisions in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). Petitioner, however, seriously oversimplified the questions before this Court where she states:

> If there is a right to life created by the constitution, which was clearly established at the time of the conduct in question, the test of *Harlow* has been met.

(Petition at 38.) As stated by the district court (Judge Clyde H. Hamilton) in the Sylvia Brown case:

> [A]n official's knowledge of a general constitutional provision, such as the Fourteenth Amendment, does not always tell him whether proposed action or inaction would violate that general constitutional provision. The defense of qualified immunity depends instead on an analysis of whether the courts have decided that a *particular right* is included within the general constitutional provision. (citations omitted) (emphasis in original).

(A-86-87)

The Fourth Circuit carefully examined the law as it existed at the time of these children's deaths to determine whether the courts had decided that the *particular right* to protection claimed by the petitioner was included

within the fourteenth amendments protection. This is the analysis required by *Harlow*.

In *Harlow* this Court established a standard of fairness by which official conduct is to be judged. The court concluded that it is not fair to require governmental officials to anticipate changes in the law or know that the law forbade conduct not previously identified as unlawful. Thus, the Court held that if the law at the time of alleged violation is not established with sufficient clarity to put a reasonable official on notice that his conduct is forbidden, immunity applies.

The Petitioner contends that the Fourth Circuit's analysis goes further and entitles governmental officials to good faith immunity in every case in which there is no prior court decision "directly on point" and allows officials to "hide behind the claim that the particular factual setting in question has never been addressed in a reported opinion." (A-34). This is clearly not the approach taken by the Fourth Circuit.

The court made it clear that its inquiry was not limited to search for a case directly on point. The court stated:

> Thus, our examination of case law must be aimed at determining the extent to which a clearly defined right had emerged from this shifting line of cases as of 1979.

In examining the scope of the fourteenth amendment protection the Fourth Circuit correctly looked to the only source available, the decisions of this Court and the United States Courts of Appeal. After careful examination of these cases the court found that the most relevant line of

cases existing in 1980 are those dealing with protection of prisoners in an eighth amendment context. Certainly it is not fair for these state officials to be charged with the foresight to view these cases as ultimately controlling their conduct in adopting and implementing programs for protection of abused and neglected children. No more relevant line of cases or legal analysis was found by the court and none has ever been suggested by the petitioner other than the bare assertion that the right to life is "clearly established" because it is in the fourteenth amendment.

III. Respondents Do Not Forfeit Their Qualified Immunity Because They Failed to Comply With Clear State Statutes.

The petitioner complains further that the court should have considered factors other than reported cases in determining that the law was clearly established. Specifically, she claims that the "better view" is that taken by the district court (Judge William W. Wilkins) in the Michael Clark case, where the court held that when a governmental official acts in violation of a specific state statute he may not claim *Harlow* immunity. This approach was expressly rejected by this Court last term in *Davis v. Scherer,* 52 U.S.L.W. 4956 (1984). In *Davis v. Scherer,* this Court held that state officials do not forfeit their qualified immunity by failing to comply with clear state statutes or regulations. This court, therefore, has authoritatively decided this issue.

———o———

CONCLUSION

Because the petition presents issues that have already been decided by this Court; and because the Fourth Circuit's application of this Court's decision of *Harlow v. Fitzgerald* is correct, this Court should deny the Petition for Writ of Certiorari.

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